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In The Supreme Court of the United States

OCTOBER TERM, 1906.

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No. 215.

CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY,

Appellant,

v.

F. C. BABCOCK, AS TREASURER OF ADAMS COUNTY, NEBRASKA, ET AL,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF OF APPELLEES.

NORRIS BROWN, ATTORNEY GENERAL,
For Appellees.

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POINTS AND AUTHORITIES.

I.

When the State Board of Equalization and Assessment fixed the value of complainant's property in Nebraska, it acted judicially and its judgment cannot be assailed collaterally except for fraud or want of jurisdiction.

Courts of equity are without power to control the discretion vested in said board by law as to the value of property for taxation purposes.

Lowenthal v. People, 192 Ill. 222.
Keokuk Bridge Co. v. People, 186 Ill. 267.
Connecting R. Co. v. People, 119 Ill. 182.
Ottawa Glass Co. v. McCaleb, 81 Ill. 562.
Jones v. Rushville Nat. Gas. Co., 135 Ind. 595.
Senour v. Matchett, 140 Ind. 636.
High on Injunctions, Vol. 1, Secs. 485, 486, 490, 493.
Haywood v. Buffalo, 14 N. Y. 534.
Burns v. Mayor, 2 Kan. 454.
McPike v. Pew, 48 Mo. 525.
Warden v. Supervisors, 14 Wis. 618.
Clark v. Ganz, 21 Minn. 387.
City Council v. Sayre, 65 Ala. 564.
Stanley v. Albany County, 121 U. S. 535.
Collins v. Keokuk, 118 Ia. 30.
Cooley on Taxation, Vol. 1, 3rd Ed. p. 784.
State Railroad Tax Cases, 92 U. S. 575.
Pittsburg R. Co. v. Backus, 154 U. S. 421.
Maish v. Arizona, 164 U. S. 599.
Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194.
Western Union Tel. Co. v. Taggart, 163 U. S. 1.
Ogden City v. Armstrong, 168 U. S. 224.
Henderson Bridge Co. v. Kentucky, 166 U. S. 150.

State v. Dodge, 20 Neb. 599.
State ex rel Bee Pub. Co. v. Savage, 65 Neb. 714.
Coulter v. Louisville & N. R. C., 196 U. S. 605.

II.

The allegation in the bill of complaint charging fraud against the State Board of Equalization and Assessment is not sustained by the evidence. (Record pp. 261-5; 250-5; 238-42; 505-25.)

III.

The methods authorized by the Nebraska law and followed by the State Board of Equalization and Assessment are sanctioned by the courts of the country.

State Railroad Tax Cases, 92 U. S. 575.
Pittsburg R. Co. v. Backus, 154 U. S. 421.
K. C., Ft. S. & M. R. Co. v. King, 57 C. C. A. 278.
Traction Company Cases, 114 Fed. 557.
Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185.

IV.

The evidence shows conclusively that the property of complainant was assessed below its true and full value by the State Board. (Record pp. 261-5; 250-5; 238-42; 505-25; 283-310.)

V.

Equity will not enjoin the collection of taxes on account of the under assessment of other property by taxing officers, unless it appears that such undervaluation is the result of system, design, intention, habit, custom, or agreement.

Taylor v. Louisville & N. R. Co., 88 Fed. Rep. 350.
German Nat. Bank v. Kimball, 103 U. S. 732.
New York v. Barker, 179 U. S. 190.
Exchange Nat. Bank v. Miller, 19 Fed. Rep. 372.
Coulter v. Louisville & N. R. C., 196 U. S. 605.

VI.

The evidence fails to show that the County Assessors and County Boards of Equalization by intention, custom, system, design or agreement undervalued property within their jurisdiction.

The evidence affirmatively shows that all property within their jurisdictions was assessed by the local taxing officers in good faith and at its full value. (Record pp. 136-7; 183, 505; Testimony of Assessors, pp. 248, 359,-362.)

VII.

The question of undervaluation of other property by the local taxing officers was adjudicated by the State Board of Equalization and Assessment, when, on the complaint of the complainant and in its presence, the State Board of Equalization passed on the valuation of lands, livestock, and other properties subject to the jurisdiction of local taxing officers. Complainant is therefore bound and cannot attack such judgment of said Board collaterally.

Coulter v. Louisville & N. R. C., 196 U. S. 605.
Hacker v. Howe, 101 N. W. (Neb.) 255.

VIII.

Whenever the law vests in a special officer or tribunal the duty and power to ascertain and determine a question of fact, such decision amounts to more than a mere presumption that the fact exists, and such decision cannot be overthrown in a collateral attack by evidence tending to show that the fact was otherwise than was found and determined.

Pittsburg C. C. & St. L. R. Co. v. Backus, 154 U. S. 434.
W. U. T. Co. v. Taggart, 163 U. S. 1.
Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 229.
Coulter v. Louisville & N. R. C., 196 U. S. 605.

IX.

The complainant in this case has not been discriminated against or denied the equal protection of the laws within the meaning of the fourteenth amendment to the Constitution of the United States by reason of the action of the State Board of Equalization and Assessment in assessing its property in the State of Nebraska, nor by reason of the action of the local taxing officers and local Boards of Equalization which assessed property other than railroads within their jurisdiction.

Coulter v. Louisville & N. R. C., 196 U. S. 605.
King v. Mullins, 171 U. S. 436.
M. & M. Nat. Bank v. Pennsylvania, 167 U. S. 464.
Florida C. & P. R. Co. v. Reynolds, 183 U. S. 476.

STATEMENT.

This action was brought by the complainant and appellant, the Chicago, Burlington and Quincy Railway Company, a non-resident corporation of the state of Nebraska, against F. C. Babcock and his co-defendants as county treasurers of the several counties of the state through which the complainant operated its railroad in Nebraska, to enjoin a portion of the tax levied against said company by the taxing officers of the state for the year 1904.

The bill of complaint discloses that the taxes enjoined amounted in all to $216,809.53 (R. 51), and that said taxes were due the several school districts, townships, counties, and the state itself. The total taxes levied and assessed against the complainant for the year 1904 by the taxing officers of the state and its municipal subdivisions was $661,520.31. (R. 51.) Prior to the filing of the bill of complaint in the Circuit Court of the United States for the District of Nebraska the complainant tendered to the several defendant county treasurers, who were by virtue of law collectors of all taxes, the sum of $444,710.78 (R. 51), or $55,353.10 less taxes than it paid the year before under the old law. (R. 218.) As a reason for enjoining the collection of said taxes the complainant alleged in its bill:

First, that prior to the meeting of the state board of equalization and assessment,—the body authorized by law to assess railroad property,—politicians and the press by discussion and resolution asserted that the railroads of the state were tax-shirkers and did not bear or pay their just proportion of taxes, and demanded that the members of the state board of equalization and assessment increase the assessment of railroad properties; that by reason thereof the members of said board were coerced, and through fear and a desire for future political advantage to themselves, permitted their reason to be overthrown, and without exercising their own judgment, arbitrarily

and fraudulently made the assessment and valuation complained of.

Second, that the members of said board of equalization and assessment entered into a conspiracy among themselves to arbitrarily assess railroad property far beyond its real or actual value, for selfish and fraudulent purposes; that said members of the board of equalization and assessment, without investigation or consideration of the facts, determined and agreed among themselves to assess the railroad properties within said state at the sum of about forty-six million dollars, and that in pursuance of said conspiracy said board of equalization and assessment arbitrarily and without reason apportioned the said forty-six million dollars among the several railroads of the state, in violation of law and in fraud of complainant's rights.

Third, that said board of equalization and assessment in fixing and determining the value of complainant's property considered and valued its franchise, derived from the Congress of the United States.

Fourth, that said board in fixing the value of complainant's property for assessment within the state took into consideration the earnings of complainant's property upon business interstate in character which had neither origin nor destination within the state of Nebraska.

Fifth, that said board in valuing complainant's property for assessment valued the same about twenty per cent. higher than the relative value of all other property subject to assessment within the state.

Sixth, that the value of complainant's property as found by the said board for assessment purposes was in excess of its real and true value.

Seventh, that said board in determining the value of complainant's property ascertained the value of the stocks and bonds upon the whole system of complainant's road, divided

the same by the total number of miles, fixing the amount of complainant's property in Nebraska at the amount thus ascertained of the total value per mile of the system multiplied by the number of miles of road within the state of Nebraska, without deducting therefrom valuable terminal rights in other states, as well as other property not used by complainant as a part of its system of road, but which property entered into and was considered in ascertaining the value of such stocks and bonds.

To the bill of complaint the defendants, the appellees herein, filed their joint and several demurrer and answer. The demurrer challenged the jurisdiction of the court for the following reasons:

First, that it appeared by the complainant's own showing by the said bill of complaint that it was not entitled to the relief prayed in said bill against said defendants or any of them.

Second, that on the face of the bill it was apparent that the court had no jurisdiction to hear and determine the action.

Third, that said bill of complaint was wholly without equity.

Fourth, that it appeared on the face of said bill of complaint that complainant had an adequate remedy at law.

Fifth, that the bill of complaint did not make or state such a case as would entitle the complainant to the relief prayed in a court of equity.

The answer alleged that the state board of equalization and assessment had determined and fixed the full value of complainant's property in the state of Nebraska during the year 1904 to be $101,184,881, after a full and careful and conscientious investigation into the value of said property, which sum, pursuant to law, said board divided by five, leaving $20,235,186, the assessable value of complainant's property in Nebraska for the year 1904; that said assessment was made by said board in good faith, without fear or favor, and in the

exercise of the best judgment of each of the members of said board of equalization and assessment. The answer further denied that said assessment so fixed by said board was in any manner or character excessive, fraudulent or void. It further denied that the members of said board ever at any time entered into any agreement among themselves to fix the value of complainant's property or the value of railroad property generally in the state prior to its investigation of said property and prior to a full consideration of the returns of complainant and the facts concerning its property, and a full and careful consideration of all the evidence produced before said board touching the value of said property.

The answer further alleged that said assessment of complainant's property was made by said board without reference to what the assessment of other property in the state might be, and wholly independent of all considerations and facts touching the value and assessment of other property in the state. The answer denied that the members of said board were moved by politicians, public clamor or the press to place any value in any sum upon complainant's property. The answer further alleged that all other property in the state had been assessed at its full value, as provided by law, by the several county assessors and county boards of equalization throughout the state. Denied that there was any agreement or conspiracy or custom or intention on the part of any of the county assessors to underassess property within their jurisdiction.

The answer further alleged that subsequent to the assessment by the state board of equalization and assessment of railroad property, said board convened on the 18th day of July, 1904, for the purpose of equalizing the assessment of all properties assessed in the state of Nebraska; that said board had before it the abstracts of the several county assessors of the state for consideration; that complaints were made to said state board charging under-valuation of property in some of the counties by the county assessors and the boards of equalization

thereof, and that complainant appeared before said board making such complaint and filed with said board a written protest alleging under-valuation by the assessors and county boards of equalization of properties within their respective districts. That on said protest of complainant and the complaints of other citizens, persons and corporations of the state, due and full hearing was had, witnesses were sworn and testified with respect to the matters alleged in said protest and complaint; investigation was made by said board on its own behalf with respect to the truth of said protest and complaint, and that after full and adequate consideration thereof, the testimony introduced thereon, and after arguments of counsel and agents representing the complainant railroad company, said board found that the property in twenty-four counties had been in its judgment undervalued, and in accordance with said finding said state board of equalization and assessment, sitting as a board of equalization, increased the assessment in said twenty-four counties from five to fifteen per cent. That in the other counties of the state said state board of equalization found on the evidence introduced that all property, real and personal, assessed and returned by the local assessors to the county boards of equalization had been assessed at its full, actual value. The answer further alleged that no appeal or exception was taken to said finding and judgment of said board of equalization by complainant or any other person or corporation.

The answer further alleged that said board of equalization and assessment in determining the value of complainant's property considered the value of its physical property as returned by the complainant itself; considered the value of its stocks and bonds, and considered the earnings of said complainant as returned by it; that it gave full and careful consideration to all the explanations made by the agents of complainant touching its annual reports and statements, and touching its earnings, its bonds and its stocks, and their value. The answer further alleged that the real and full value of complainant's property

in the state of Nebraska for the year 1904 was far in excess of the sum fixed by the said state board of equalization and assessment.

A trial before the Honorable Circuit Court resulted in findings in favor of the defendants and against the complainant. A decree was entered dismissing the bill of complaint, to which complainant excepted and the case is now before this Honorable Court for review.

ARGUMENT.

I.

The Revenue Law of the State of Nebraska.

For convenience we here insert a copy of the statute under which the assessment complained of was made. This law was passed by the legislature of Nebraska in the year 1903, and the assessment complained of is the first assessment made under that law. We quote only such portions of the statute as may be applicable to the controversy before the Court. (Ch. 77, Compiled Statutes.)

"Section 12. **(What Property Taxable.)** All property in this state not expressly exempt therefrom, shall be subject to taxation, and shall be valued at its actual value which shall be entered opposite each item and shall be assessed at twenty per cent. of such actual value. Such assessed value shall be entered in a separate column opposite each item, and shall be taken and considered as the taxable value of such property, and the value at which it shall be listed and upon which the levy shall be made. Actual value as used in this act shall mean its value in the market in the ordinary course of trade.

"Section 24. **(Deputy Assessors.)** Each deputy assessor shall, upon actual view, list, value, assess, and return all property subject to taxation in the townships, precincts, districts, cities or wards, and villages, assigned him in the manner provided in this act.

"Section 84. **(Railroad Companies.)** The property of railroads, railroad corporations and car companies, shall be annually assessed as prescribed in this act by the state board of equalization and assessment.

"Section 85. **(Railroads Assessed by State Board.)** The state board of equalization and assessment is hereby empowered and it is made its duty, to assess all property of the railroads and railroad corporations in the State of Nebraska: Provided, however, that all machine repair shops, general office buildings, store houses, and also all real and personal property, outside of right of way and depot grounds as of and belonging to any such railroad and telegraph companies, shall be listed for purposes of taxation by the principal officers or agents of such companies, with the deputy assessors of any precinct of the county where such real or personal property may be situated, in the manner provided by law for the listing and valuation of real and personal property.

"Section 86. **(When and How Assessed.)** The board on the first Monday in May, 1904, and anually thereafter shall proceed to ascertain all property of any railroad company owning, operating or controlling, any railroad or railroad service in this state which for the purpose of assessment and taxation, shall be held to include the main track, side track, spur tracks, warehouse tracks, road bed, right of way and depot grounds, and all water and fuel stations, buildings and superstructures thereon, and all machinery, rolling stock, telegraph lines and instruments connected therewith, all material on hand and supplies provided for operating and carrying on the business of such road, in whole or in part, together with the moneys, credits, franchises and all other property of such railroad company used or held for the purpose of operating its road, and appraise and assess the same as personal property as herein provided.

"Section 87. **(Report of Railroads to State Board.)** On or before the fifteenth day of April, 1904, and annually thereafter, the person, company or corporation owning, operating or controlling any railroad or railroad service in this state, shall by its president, secretary, or principal accounting officer, return to the state board of equalization and assessment a sworn statement or schedule of the property of said company on the 31st day of March preceding as follows:

"*First.* Of the right of way, track and road bed, giving the entire length of the main track in this and other states, and showing as to this state, the portion of each county, township or city.

"*Second.* The length of each side or second track and turn-out, spur and warehouse track,and aggregate length of such side or second track, turn-out, spur, and warehouse tracks, together with the name of the county, city, village, and school and road district, in which such side or second track and turn-outs, spur and warehouse tracks are located.

"*Third.* A complete list giving size, location as to county, township and city and village, material and value of all depots, station houses, machine shops, stock yards, scales or other buildings situated wholly or in part on the right of way, together with all platforms, fuel and water stations, and the machinery and tanks connected therewith.

"*Fourth.* Showing the number of ties in track per mile, the weight of iron or steel rails per yard used in the main or side track, what joints or chairs are used in track, kind of ballasting, length of time iron or steel has been used, and what length of time the road has been built.

"*Fifth.* A full list of the rolling stock belonging to or operated by such road, which shall distinctly set forth the number, class and value of all locomotives, passenger cars, dining cars, express cars, mail cars, baggage cars, grain cars, box cars, horse cars, cattle cars, coal cars, flat cars, wrecking cars, pay cars and all other kinds of cars owned or used by said company, whether within or without the state of Nebraska, together with a statement of the number of miles traveled by each of said classes of cars over the line of said company within the state of Nebraska and without the state of Nebraska, separately during the year preceding the first of January last past.

"*Sixth.* A statement or schedule showing: (1.) The amount of capital stock authorized, and the number of shares into which said capital stock is divided. (2.) The amount of capital stock paid up. (3.) The market value of such stock, or if of no market value, then the true value of the shares of stock. (4.) The total amount of all secured and unsecured indebtedness, except for current expenses of operating the road. (5.) The location and actual valuation of all its real estate and personal property in this state that is locally assessed.

"Such schedule shall be made in conformity to such instruc-

tions and forms as may be prescribed by the state board of equalization and assessment, which values shall be taken into account and be considered in arriving at the true value of such railroad property and its franchises.

"*Seventh.* A correct return of the value of all tools and materials used for repairs, and of all other personal property in the State of Nebraska, together with such other information as the state board of equalization and assessment may require in order to enable them to apportion such rolling stock between the main line and branches of said road.

"*Eighth.* A true statement of all bridges, showing where located as to county, township, village, city, school and road district, the true value thereof, kind and material, the length, width and height of such structure.

"*Ninth.* The total gross earnings and net earnings of said corporation, during the year for which said statement is made, and the total amount expended in the operations and maintenance of the property, and the improvements thereof, distinguishing that expended in improvement or betterment from that expended in maintenance or operation, also the dividend last declared upon its shares of stock and the amount thereof, and the date, number, and the amount of all dividends declared upon its stock during the year next preceding the date of such report, and such further information as the state board may in writing require, all of which shall be taken into consideration in ascertaining and fixing the value of such road and the franchise thereof together with such other information as said state board may require in relation thereto.

"Section 89. **(Unit Assessment.)** The returns of railroad companies or corporations shall not be held to be conclusive as to the value of said property, but the state board of equalization and assessment shall, from all the information which it is able to obtain, find the true value of all such property, including tangible property and franchises, and shall assess the same on the same basis as other property is hereby required to be assessed. The valuation of each mile to be determined by dividing the whole value by the number of miles of the main track of each road or line.

"Section 93. **(Certificate to County Clerks.)** The state board of equalization and assessment after having valued and assessed all the railroad property in this state in accordance with the provisions of this act, shall immediately make return

to the county clerk of each and every county in which any portion of said railroad property as designated in this article, may be located, to be used as the basis of levy for the county, township, precinct, city, village, school and road districts therein, and through which any railroad or part thereof may extend.

"Section 113. **(County Assessor.)** The county assessor, in addition to the other duties provided by law, shall have general supervision over and direction of the assessment of all property in his county. He shall advise and instruct deputy assessors as to their duties, and shall visit them for that purpose as often as possible, and at least once between the first day of April and the first day of June of each year. He shall require of deputy assessors that the assessment of property be uniform throughout the county, and that the property be assessed as directed by law, and to that end he shall be authorized to alter or change any assessments made by any deputy assessor, so that the same shall conform to law. He shall furnish each deputy all necessary blanks, schedules, maps and lists for the purpose of making such assessment, and shall receive from each deputy the assessment rolls, lists of property with oaths attached and schedules as fast as the same are completed. He shall carefully examine the assessment rolls, lists, schedules and returns made by deputies, and shall see that the same are correctly made and are complete in all respects. He shall require any necessary or proper changes to be made by the deputy before transmitting the same to the county clerk. As soon as the assessment rolls, lists and returns have been corrected and verified by the county assessor he shall file the same with the county clerk. The county assessor shall obey all rules and regulations made under this act and the instructions sent out by the state board of equalization and assessment.

"Section 120. **(County Board of Equalization.)** The county board, the county assessor and county clerk, shall constitute the county board of equalization, and the county clerk shall be the clerk of said board.

"Section 121. **(County Board of Equalization.)** The county board shall hold a session of not less than three nor more than twenty days for the purpose contemplated in this section, commencing on the first Tuesday after the second Monday of June each year, and shall,—

"*First.* Fairly and impartially equalize the valuation of the personal property of the county, and to that end shall, on the

application of any person who may deem himself aggrieved, or who shall complain that another is assessed too low, review the assessment and correct the same as shall appear to be just.

"*Second.* At its meeting in the year 1904, and every fourth year thereafter, equalize the valuation of real property of the county by raising the valuation of such tracts and lots as are assessed too low, and by lowering the valuation of such tracts and lots as are assessed too high.

"*Third.* Ascertain whether the valuation in one township, precinct or district, bears just relation to all townships, precincts, or districts in the county; and may increase or diminish the aggregate valuation of property in any township, precinct or district, by adding or deducting such sum upon the hundred as may be necessary to produce a just relation between all the valuations of the property in the county. It may consider lands, village or city lots and personal property, and different classes of personal property, except property assessed and valued by the state board of equalization and assessment, separately and determine a separate rate per cent. of addition or reduction for each of said classes of property as may be necessary to adjust the equalization thereof.

"*Fourth.* Adjust assessments for the county by raising or lowering the assessment of any person as to any or all the items of his assessment in such manner as to secure the listing of property at its actual value and the assessment of property at its taxable value. But in no case shall the assessment of any person be raised by the board until such person, or his agent, shall be previously notified, if such person or his agent be found in the county.

"*Fifth.* Also add to the assessment rolls any taxable property not included therein, assessing the same in the name of the owner thereof as the assessor should have done, but no personal property shall be so added unless the owner thereof is previously notified, if he be found in the county.

"Section 122. **(County Board of Equalization.)** Whenever any county board of equalization shall have reason to believe that any person, company or corporation has not listed all of his or its property for taxation, or that any property has not been fairly valued and assessed, it shall be lawful for such board to call before it any such person, or any agent or officer of any such corporation, and require the production of any books, records, or papers. The person so called shall be sworn,

and shall answer under oath, and give all information which he may possess, touching the existence, location, and value of any property sought to be listed, valued, and assessed, and no person so called shall be excused from answering any question put to him on the ground that his answer might tend to criminate him, but no answer he shall make, or testimony he may give, shall be used against him in any criminal prosecution.

"Section 123. **(County Board of Equalization.)** The board may issue process to compel the attendance before it of any person, with books, records and papers, if necessary, which process shall be served by the sheriff the same as a summons from the district court, and he shall receive the same fees therefor. Any person who shall fail to respond to such process, or who shall refuse to answer any proper question put to him by said board, shall forfeit the sum of five hundred dollars, to be recovered in a civil action in the name of the county. Witnesses shall receive the same fees as witnesses in the district court to be paid by the person the valuation of whose property is being investigated, in case the board finds that such person has wilfully concealed or undervalued his property; otherwise, by the county.

"Section 124. **(Appeals from County Board of Equalization.)** Appeals may be taken from any action of the county board of equalization, to the district court within twenty days after its adjournment, in the same manner as appeals are now taken from the action of the county board in the allowance or disallowance of claims against the county. No appeal shall in any manner suspend the collection of any tax, or the duties of officers relating thereto, during the pendency of the same, and all taxes affected thereby which may be collected shall be kept by the treasurer in a special fund without distribution.

"The court shall hear the appeal as in equity and without a jury, and determine anew all questions raised before the board which relate to the liability of the property to assessment, or the amount thereof, and any decision rendered therein shall be certified by the clerk of the court to the county clerk, who shall correct the assessment books in his office accordingly. If the tax books have been delivered to the treasurer of the county for the collection of such tax before the determination of such appeal in the district court, a copy of such decision shall be certified to the treasurer of such county, who shall thereupon distribute or return such tax so held, in accordance

with such decision, and such treasurer shall correct his record to conform to such decision, unless a further appeal be taken to the supreme court, in which case the treasurer shall hold said tax until the final determination of such appeal in that court.

"Section 125. **(Abstract to State Board.)** The county assessor, immediately after the board of equalization shall have completed its labors, shall prepare an abstract of the assessment rolls of his county on blanks to be furnished by the state board, the values to be given shall be as equalized and corrected by the county board, and forward it to the state board of equalization and assessment on or before the tenth day of July, such abstract shall contain: (Here follows a blank list for the purpose of putting in the number of acres of land and its value, total and average, also for putting in the number of horses, cattle, and other items of personal property, together with their value.)

"Section 127. **(State Board of Equalization.)** The governor, auditor, treasurer, secretary of state, and commissioner of public lands and buildings, are hereby constituted the state board of equalization and assessment.

"Section 129... **(State Board of Equalization.)** Said state board shall have a seal with which all orders, certificates and process shall be attested. The board shall provide a uniform method of keeping all books relating to taxation in the several counties of the state. It shall formulate and send to the county clerk of each county all necessary forms to be used in the listing, assessment and return of property, and in the levy and collection of taxes. It shall have general direction and control of the county assessors in the performance of their duties, and shall direct the same.

"Section 130. **(Time and Place of Meeting.)** The state board of equalization and assessment shall, on the third Monday of July in each year, meet at the State Capitol for the purpose of equalizing assessments. They shall proceed to examine the abstracts of property assessed for taxation in the several counties of the state, including railroads entirely within such county, and all other property, and shall equalize such assessments so as to make the same conform to law, and for that purpose they shall have the power to increase or decrease the assessed valuation of any county, and such increase or decrease shall be made by a per centum, and the per cent. of

increase or decrease when made shall be certified to the county clerk of the proper county, who shall thereupon add to or deduct from the assessment of each piece or parcel of property in the county affected, an amount equal to the per cent. of increase or decrease fixed by the state board.

"Section 132. **(Final Assessment.)** No assessment shall be deemed final until the action of the state board shall have been had and certified to county clerks; and by them extended upon the tax rolls, as herein provided; and the assessment as herein made and corrected by the county board of equalization and by the state board shall be the final assessment of property for that year, except as herein provided, and taxes for all purposes shall be levied upon such final assessment; *provided,* however, that the county assessor or county clerk may, at any time, add to the tax rolls any property omitted therefrom for the current year."

The power of the legislature to pass the foregoing statute may be found in the constitution of Nebraska, which provides:

"The legislature shall provide such revenue as may be needful by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his, her, or its property and franchises, the value to be ascertained in such manner as the legislature shall direct; and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, innkeepers, liquor dealers, toll-bridges, ferries, insurance, telegraph, and express interests or business, venders of patents, in such manner as it shall direct by general law, uniform as to the class upon which it operates." (Constitution of Nebraska, art. 9, sec. 1.)

It will be observed that the constitutional provision quoted provides not alone that property shall be taxed in proportion to its value, but "that the *value* shall be ascertained in such a manner as the legislature shall direct." In obedience to this command of the constitution the legislature of 1903 repealed the old revenue law and passed the enactment hereinbefore quoted, which is now in force. The bill of complaint does not question the validity of this statute; the sole complaint is against the action of the state board of equalization and assessment had under and by virtue of said statute.

II.

When the State Board of Equalization and Assessment fixed the value of complainant's property in Nebraska, it acted judicially and its judgment cannot be assailed collaterally except for fraud or want of jurisdiction.

Courts of equity are without power to control the discretion vested in said Board by law as to the value of property for taxation purposes.

The rule is well established throughout the several state and federal jurisdictions of the country that an assessment and equalization board acts judicially when it determines the value of property for taxation purposes. Its determination of value is a judicial finding; its judgment stands as a judgment of a court, and cannot be impeached or set aside except for fraud or want of jurisdiction. Courts have no power to revise an assessment of a legally constituted assessment board because of an alleged over-valuation. The question of value is for determination by the board of assessors, and not by the courts. If the judgment of the assessing board is the result of an investigation and a consideration of the subject-matter in good faith, it is final and conclusive upon both the state and the taxpayer, and is not subject to collateral attack. In order to give a court of equity jurisdiction in a collateral proceeding to ascertain the validity of a tax assessment, one of two things must clearly appear—either fraud or a want of jurisdiction.

"Courts have no power to revise assessments, made by the board of assessors and approved or revised by the board of review, upon the ground that those parties fell into an error of judgment in estimating the value of the property." (*Loewenthal v. People*, 192 Ill., 222.)

"Though an overvaluation appears, an assessment will be sustained where it cannot be said to be so excessive as to warrant a finding that it was not honestly made, and was known to be excessive." (*Keokuk Bridge Co. v. People*, 186 Ill., 267.)

"Decision of the state board of equalization is *quasi*-judicial

in its nature, and on application for judgment for unpaid taxes such decision can be assailed only for fraud or want of jurisdiction." (*Connecting R. Co. v. People,* 119 Ill., 182.)

"The taxing power is legislative and political in its nature, and is not under the judicial power of the state; and the courts cannot interfere unless the tax is void, because levied without power on the part of the officers executing the revenue laws. It devolves upon the general assembly to provide the revenue and the means for its levy and collection, without interference of either of the other departments. As long as officers are acting under the law in imposing and collecting taxes, the courts will not interfere, but when they transcend their powers and act without warrant of law, the courts may give relief. Hence if the legally constituted board of equalization have acted within the scope of their authority, and if they have reasoned incorrectly and erred in judgment, we have no power to review and correct their action. They are empowered by law to fix the value of the property of corporations for taxation, and we can afford no relief, even if the rules that govern them are not such as commend themselves to our notions of the best means of ascertaining their value." (*Ottawa Glass Co. v. McCaleb,* 81 Ill., 562.)

"The action of a county board of equalization is not subject to collateral attack, by injunction or otherwise, unless the assessment is void, and not merely erroneous. Such board is a *quasi*-judicial tribunal, and binds everyone within its jurisdiction." (*Jones v. Rushville National Gas Co.,* 135 Ind., 595.)

"When a county board of review obtains jurisdiction over the person of a taxpayer whose list is called in question, by virtue of notice provided by the statute, or upon appearance of the taxpayer whose list is called in question, its action or decision in the matter, whether right or wrong, is binding upon him until set aside or vacated by an appeal or some other direct, authorized proceeding, and he will not be permitted to assail the same in a court of equity." (*Senour v. Matchett,* 140 Ind., 636.)

Aside from the authorities above quoted the rule has been recognized by every text-book writer on equity. Mr. High in his valuable work on injunctions has given a great deal of space to the discussion of when a court of equity may interfere to revise or set aside the findings of the assessment board. He lays down the general rule that equity will not interfere by injunction with the tax which is alleged to be illegal merely because it is a hard-

ship or is too high. (High on Injunctions, vol. 1, sec. 485; *Haywood v. Buffalo,* 14 N. Y., 534; *Burns v. Mayor,* 2 Kans., 454; *McPike v. Pew,* 48 Mo., 525; *Warden v. Supervisors,* 14 Wis., 618; *Clark v. Ganz,* 21 Minn., 387; *City Council v. Sayre,* 65 Ala., 564.)

"Nor will equity interfere by injunction with the enforcement or collection of taxes because of irregularities, illegalities or errors in the assessment of the tax, or in the proceedings incident to its collection, or in the execution of the power conferred upon taxing officers; but in all such cases the taxpayer seeking relief will be left to pursue his remedy at law." (High on Injunctions, vol. 1, sec. 486.)

Of the authorities cited by the author to sustain the rule, the following may be noted: *O'Neal v. Virginia,* 18 Md., 1; *Warden v. Supervisors,* 14 Wis., 618; *Macklot v. Davenport,* 17 Ia., 379; *Exchange Bank v. Hines,* 3 O. St., 1; *Jackson v. Detroit,* 10 Mich., 248; *Hallenbeck v. Hahn,* 2 Neb., 377; *Challis v. Commissioners,* 15 Kans., 49; *Supervisors v. Jenks,* 65 Ill., 275; *Brown v. Herron,* 59 Ind., 61; *Western R. Co. v. Nolan,* 48 N. Y., 513.

"The excessive valuation of property is an irregularity where the assessing officers had jurisdiction and acted in good faith." (*Stanley v. Albany County,* 121 U. S., 535; *Henne v. Los Angeles Co.,* 59 Pac., 780; *Columbia Savings Bank v. Los Angeles Co.,* 137 Calif., 467; *Senour v. Matchett,* 140 Ind., 636; *Collins v. Keokuk,* 118 Ia., 30; *Burlington Gas Light Co. v. Burlington,* 101 Ia., 458; *Harrington v. Gliddon,* 179 Mass., 486; *Detroit Street Railway v. Detroit,* 125 Mich., 673; *Clark v. Stearns Co.,* 66 Minn., 304; *People v. Adams,* 125 N. Y., 471; *Bratton v. Johnson,* 76 Wis., 430.)

In *Collins v. Keokuk,* 118 Ia., 30, 91 N. W., 791, *supra,* the supreme court of Iowa said:

"That overassesment is an irregularity which will not render a tax void, has been repeatedly held. In *Nugent v. Bates,* 51 Ia., 77, we said: 'The assessment may have been for too much. If so, it was erroneous merely, and not void.' In the *Missouri Valley Bridge Case,* 74 Ia., 284, we followed the same rule, saying: 'It may be conceded that the assessment was erroneous, that is, the value of the bridge was fixed by the assessor at more than it should have been, but this simply shows it to have been an over-assessment, and in such a case the remedy of the taxpayer is to apply for its correction to the board of equalization.'"

In speaking of the power of the court to enjoin on account of an overassessment, the supreme court of Iowa in the same case says:

"It is argued that this remedy is inadequate, because there is no provision for an appeal and plaintiff is thereby deprived of a constitutional right. There is no claim made, however, that plaintiff did not have timely notice of the assessment, or that he ever sought relief therefrom at the hands of the equalizing board; and he cannot proceed upon the assumption that such board would not have done justice in the matter, or that there would have been any occasion for the exercise of the right of appeal had such right been given. On the contrary, the presumption, if any, must be that any excess in the assessment of plaintiff's property would have been remitted by the board upon proper showing made; but we do not think that it has ever been held that, because a right of appeal from the finding of an equalization board is not given by law, a tax levied upon such assessment is void. It is not necessary to due process of law that the property holder be given the power to have an assessment reviewed by the court. As we have before noted, the grievance of which plaintiff complains does not go to the tax itself. So far as appears from the record, the levy was by the proper officers, for lawful purposes, and at lawful rates. If the assessor in returning the value of plaintiff's property, or the board of review in confirming it, fixed the same at an excessive or disproportionate value, it is immaterial, for the purpose of this case, whether the error is one of judgment, or of gross incompetency, or obedience to a void statute; the result is the same, *it is neither more nor less than an irregularity in assessment, for the correction of which as we have already shown, injunction will not be granted.*"

"In reviewing the action of taxing officers upon bills to enjoin the enforcement of a tax, courts of equity are inclined to indulge the usual presumption in favor of the regularity and validity of the conduct of public officers, until the contrary is shown. They will not therefore enjoin upon mere general averments that the assessment was too high." (High on Injunctions, vol. 1, sec. 490.)

"In many of the states of the country different tribunals or boards of equalization are provided by law, whose functions consist in hearing complaints of persons aggrieved, adjusting inequalities among different taxpayers and equalizing the burdens

of taxation among the different persons subject thereto; and questions of such practical importance frequently occur in determining how far the action of such boards or officers may form the foundation for relief by injunction against the enforcement of taxation. The fundamental principle applicable to such cases is, that a court of equity is not a court of errors to review the acts of public officers in the assessment and collection of taxes, nor will it revise their decision upon matters within their discretion if they have acted honestly." (High on Injunctions, vol. 1, sec. 493; *Livingston v. Hollenbeck*, 4 Barb., 9; *Clinton's Appeal*, 56 Pa. St., 315; *O'Neal v. Virginia B. Co.*, 18 Md., 1; *Porter v. Rockford R. I. R. Co.*, 76 Ill., 561; *McIntyre v. Town of White Creek*, 43 Wis., 620; *Union Trust Co. v. Weder*, 96 Ill., 346; *Haywood v. Buffalo*, 14 N. Y., 534.)

"Equalization of assessments has, for its general purpose, to bring the assessments of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax. To accomplish this purpose assessment rolls are equalized by county boards, boards of supervisors or commissioners, and the aggregate of the county assessments by a state board established for the purpose. This is not done by changing individual assessments, but by fixing the aggregate sum for the several districts at what, in the opinion of the board, they should be, so that general taxes may be levied according to this determination, instead of on the assessor's footings. These boards act judicially in equalizing, and their decision is conclusive." (Cooley on Taxation, vol. 1, 3d ed., p. 784.)

To sustain the above rule Judge Cooley cites *Union Coal Co. v. Campbell*, 48 La. An. 1350; *New York v. Davenport*, 92 N. Y. 604; *Brown v. Oneida County*, 103 Wis., 149; *Grand Rapids v. Welleman*, 85 Mich., 234.

The supreme court of the United States has by an uninterrupted line of decisions given its sanction to the rule that an assessment board acts judicially, and that its judgment is not open to collateral attack on the ground of over-valuation alone. It is essential that either fraud or want of jurisdiction must appear before a court of equity will revise the judgment of the state board of equalization and assessment. In *State Railroad Tax Cases* decided by the supreme court of the United States, the court, speaking through Mr. Justice Miller, on this question said:

"As we do not know on what evidence the board acted in regard to these railroads, or whether they did not act on knowledge which they possessed themselves, and as all valuation of property is more or less matter of opinion, we see no reason why the opinion of this court, or of the circuit court, should be better, or should be substituted for that of the board whose opinion the law has declared to be the one to govern in this matter. * * Let us suppose that the complaints made in these cases against the taxes were well founded; that the mode adopted by the board of equalization to ascertain the value of the franchise and capital stock is not the best mode; that it produces unequal and unjust results in some cases; that the same is true of the mode of ascertaining the basis of assessment for the taxation by municipalities; that the board of equalization increased the entire assessment on each company without sufficient evidence; in short, let us suppose that in these and many other respects the proceedings were faulty and illegal,—does it follow that in every such case a court of equity will restrain the collection of the tax by injunction? * * * It has been repeatedly decided that neither the mere illegality of the tax complained of nor its injustice, nor irregularity, of themselves, give the right to an injunction in a court of equity. * * * We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes, but we may say, that, in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or *excess of valuation,* or hardship or injustice of the law, or any other grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax. One of the reasons why a court should not thus interfere, as it would in any transaction between individuals, is, that it has no power to apportion the tax or to make a new assessment, or to direct another to be made by the proper officers of the state. These officers, and the manner in which they shall exercise their functions, are wholly beyond the power of the court when so acting. The levy of taxes is not a judicial function. Its exercise, by the constitutions of all the states, and by the theory of our English origin, is strictly legislative. *Heine v. Levee Commissioners,* 19 Wall, 660. * * * If there be an excessive estimate of the value of the franchise or capital stock, or both,

it is by an error of judgment in the officers to whose judgment the law confided that matter; and it does not lie with the court to substitute its own judgment for that of the tribunal expressly created for that purpose." (*State Railroad Tax Cases,* 92 U. S., 575.)

In *Pittsburg Railway Co. v. Backus,* 154 U. S., 421, the supreme court of the nation again approves the doctrine announced by Justice Miller in the *State Railroad Tax Cases* above referred to. The opinion in the *Backus Case* is by Mr. Justice Brewer, and in speaking of the question before us here, he said among other things:

"The true cash value of the plaintiff's property in the state of Indiana in the year 1891 was a question of fact, the determination of which for the purposes of taxation was given to this special tribunal, the state board. Whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact, and if such determination comes into inquiry before the courts it cannot be overthrown by evidence going only to show that the fact was otherwise than so found and determined. Here the question determined by the state board was the value of certain property. That determination cannot be overthrown by the testimony of two or three witnesses that the valuation was other than that fixed by the board. It is true such testimony may be competent, and was received in this case because, taken in connection with other testimony, it might establish fraudulent conduct on the part of the board sufficient to vitiate its determinations. It is not, however, contended by counsel that there was any actual fraud on the part of that board; that the individual members thereof deliberately violated the obligations of their oaths of office, and intentionally placed upon the property of the plaintiff a valuation which they knew to be grossly in excess of that which it in fact bore, and did so with the purpose of making the plaintiff bear a greater share of the burden of the support of the state government than it rightfully should. The contention is rather that the board made a grievous mistake in placing so high a value, and that it took into consideration property outside of the state, and gave to the property within the state a value apparently deduced from that without the state. * * * Is testimony that the value placed by the

board was excessive, together with testimony that portions of the road outside of the state were of largely greater value than any similar length of road within the state, unaccompanied with evidence that the board reached the value by simply dividing the total value of the Company's property on a mileage basis, or that it failed to take into consideration the fact of such excessive value of portions outside the state, sufficient to impeach its determination? This question must be answered in the negative. No determination of a special board, charged under the law with the duty of placing a value upon property, can be successfully impeached by such meager testimony." (*Piltsburg Railroad Co. v. Backus,* 154 U. S. 421.)

Again in *Maish v. Arizona,* 164 U. S. 599, the supreme court speaking through Mr. Justice Brewer, said:

"A final objection is that the assessment was grossly unfair, and that there was a fraudulent discrimination in favor of the Southern Pacific Railroad Company. It appears that the assessment of ordinary range cattle was fixed by the territorial board at $7.42, while one witness testified that their value was from $6 to $6.50 per head. It also appears that the territorial board valued the railroad property at $6,811.14 per mile, while there was testimony that to duplicate the roadbed and track alone would cost from $21,000 to $22,000 per mile; and appellants offered to prove that the railroad company stated to the board that if the valuation was fixed at about the rate which was fixed it would pay the taxes; if much higher, it would resist collection in the courts; and that the board concluded that it was better to get some taxes out of the railroad company than none, and therefore fixed the valuation at the sum named.

"There is nothing tending to show that the board, in fixing the value of cattle at $7.42, acted fraudulently or with any wrongful intent, or that that valuation was not the result of its deliberate judgment upon sufficient consideration and abundant evidence; and it would be strange, indeed, if an assessment could be set aside because a single witness is found whose testimony is that the valuation was excessive. No assessment could be sustained if it depended upon the fact that all parties thought the valuation placed by the assessing board was correct. Something more than an error of judgment must be shown,—something indicating fraud or misconduct. Neither is the fact that an officer of the railroad company came before the board and de-

clared its willingness to pay taxes on a certain valuation and its intention to resist the payment of taxes on any higher valuation sufficient to impute fraudulent conduct to the board, although it finally fixed the valuation at the sum named by the railroad company. It appears from the testimony of one of the members of the equalization board that it was guided largely by the valuation placed in other states and territories upon railroad property, and that from such valuation, as well as from that given by the railroad company, it made the assessment at something like the average of the valuation of railroads in the various states and territories named. It is unnecessary to determine whether this board erred in its judgment as to the value of this property, whether it would not have been better to have made further examination and taken testimony as to the cost of construction, present condition, etc. Matters of that kind are left largely to the discretion and judgment of the assessing and equalizing board, and if it has acted in good faith its judgment cannot be overthrown. (*Pittsburg, C. R. Co. v. Backus,* 154 U. S. 421-435.)"

Again the supreme court in *Adams Express Company v. Ohio State Auditor,* 165 U. S. 194, affirmed the above rule, saying:

"We have said nothing in relation to the contention that these valuations were excessive. The method of appraisement prescribed by the law was pursued and there was no specific charges of fraud. The general rule is well settled that 'whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact; and if such determination comes into inquiry before the courts it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined." (*Pittsburg, C. R. Co. v. Backus,* 154 U. S. 434; *Western Union Telegraph Co. v. Taggart,* 163 U. S. 1.)"

In line with the above authorities the circuit court of the United States for the middle district of Tennessee in a recent case elaborated the principle of the authorities quoted above. We refer to the case of *Taylor v. Louisville & N. R. Co.,* reported in 31 C. C. A. 537. From the bill of complaint filed in that case it appears that the plaintiff sought to restrain the members

of the state board of equalization of Tennessee from certifying the tax valuation of the railroad company to the several tax collectors of the thirty-five counties through which the road ran. The bill contained two grounds upon which was based the right to the writ, to-wit: (*a*) Excessive valuation of its own property. (*b*) Undervaluation of other property in the state, and therefore a violation of the uniformity provision of the constitution. The first ground standing alone was held insufficient, and on this point the court said:

"It is well settled that a suit to enjoin the collection of a tax will not be entertained in courts of equity,—at least, in those of the United States,—in which the sole ground set forth in the bill is that the tax is illegal or excessive. It must appear in addition that the circumstances make the wrong about to be inflicted of such a peculiar character that the remedies in a court of law are inadequate, and so bring the case under some recognized head of equity jurisdiction. *Ogden City v. Armstrong,* 168 U. S. 224; *Express Co. v. Seibert,* 142 U. S. 339; *Allen v. Car Co.,* 139 U. S. 658; *Shelton v. Platt,* 139 U. S. 591; *Railway Co. v. Cheyenne,* 113 U. S. 516; *Hannewinkle v. Georgestown,* 15 Wall, 547; *Dows v. Chicago,* 11 Wall, 108." (*Taylor v. L. & N. R. Co.,* 31 C. C. A. 544.)

Speaking further on the matters considered by the board in determining the value of property for taxation, the court said at page 547 of the same case:

"It is sufficient to say that we find nothing in the evidence that was before the two boards which they might not properly consider, under the laws of Tennessee, as circumstances to aid them in reaching a conclusion as to the value of that part of the railroad of complainant lying in Tennessee. Nor do we discover anything in the record to indicate that such evidence was wrongly applied. We do not find anything in the record or affidavits affirmatively showing that the boards have included in their assessments property of the complainant not in Tennessee, and the defendants in their report of the assessment and in their answer expressly deny that any such property was included. The exclusion of certain expert evidence to show how unreliable a standard of value are market reports of stocks and bonds, we do not regard as material. Even if this were a direct proceed-

ing to review the action of the defendants, as upon error (which it is not) the ruling could hardly be the subject of criticism; for the matters touched upon in the affidavits were matters of general knowledge, which the defendants and the assessors might be presumed to know. The relevancy of such items of evidence as the market value of bonds and stocks, and the amount of gross earnings and the net earnings, in reaching a conclusion as to the value of a railroad or a telegraph line, has been so often recognized by the supreme court of the United States that we need not discuss it. (*Railroad v. Backus,* 154 U. S. 424; *Henderson Bridge Co. v. Kentucky,* 166 U. S. 150; *Adams Express Co. v. Ohio State Auditor,* 165 U. S. 194; Id., 166 U. S. 185.) It is contended that the law of Tennessee, as declared by its supreme court is that each line of railroad must be valued by itself, and not as a part of a system, and therefore that the unit theory, upon which the foregoing decisions were based, has no application to Tennessee. If this be true, it only reduces the size of the unit, but it does not destroy every evidential bearing of stock and bond values upon the value of railroad property; and we must presume in a collateral attack upon the action of the board, such as this is, in the absence of any showing to the contrary, that, within the limits of the reasonable discretion and judgment vested in the defendants, they gave proper consideration to the Tennessee rule, if it differs from the general rule, in weighing and applying the evidence of stock and bond values to the issue before them." (*Taylor v. L. & N. R. Co.,* 31 C. C. A. 547.)

The supreme court of Nebraska is committed to the same doctrine. In *State v. Dodge,* 20 Neb. 599, it was held that in fixing valuations for assessment purposes the officers act judicially.

Again in the case of *State ex rel Bee Publishing Co. v. Savage,* 65 Neb. 714, the supreme court of the state gives a very complete and exhaustive interpretation of the powers of the state board of equalization and assessment created under the old law; and in this connection let it be understood that the old and the new law are substantially the same so far as power conferred upon the state board of equalization and assessment to tax railroad property in the state is concerned. That was a mandamus suit brought by the relator for the purpose of compelling the

state board to reassemble and reassess the railroads, on the theory that the state board had fraudulently fixed the value of their property in the state for taxation purposes at a sum far below its true value. The court having found that the allegations of fraud were not sustained by the evidence, held that it had no legal right to inquire into the question of the value of the property, although the relator charged, and the evidence tended to show, that the value fixed by the board was grossly below its real value. The reason for the court's judgment is stated in the opinion as follows:

"It is not within the province of this court to review the assessment made by the board, and to raise or lower it as equity and good conscience might seem to require. We can only determine whether the board has proceeded in a legal manner, and, if so, we cannot direct further action, even though we may disagree with the conclusion reached, or regard the method of procedure as not the most appropriate or best calculated to secure with the greatest certainty and accuracy a true valuation of the property assessed. If they have acted by assessing all of the property it is their duty under the law to assess, and have proceeded in such manner that it cannot be said they have acted fraudulently in what they have done, the court is powerless to correct the error, even though it be conceded that the assessment as made is lower than in justice it should have been. By the laws of the state the respondents, as its officers, are constituted a special tribunal or assessing board, charged with the duty of assessing railroad and other corporate properties mentioned in the statute, over which they are given exclusive jurisdiction for that purpose. They are required to assess all such properties at a valuation so that the corporations assessed may be required to pay their just proportion of the taxes needful for the public revenues. In performing the functions allotted to them and making such assessment, in the very nature of things they are invested with certain discretionary powers requiring the exercise of an honest judgment as to the proper valuation to be placed on such property for assessment purposes; and with such discretion, when exercised honestly and in good faith, the courts cannot interfere. It will hardly be contended that the courts can be appealed to for the purpose of trying the question of whether any individual assessor of the thousands throughout the

state has valued a particular piece of property which he is required to assess at its true valuation, to be determined by some approved scientific test or method. If the assessor acts honestly, if he exercises his best judgment, and actually assesses the property, and there is no element of fraud in what he does, an assessment so made must stand (except as it may be reviewed and equalized by the properly constituted authorities in the manner provided by law), even though, by the application of the most correct and certain tests, the propery so assessed was valued above or below what in truth and justice it should be. The state board of equalization, it must be admitted, is an administration body, clothed with *quasi*-judicial powers in regard to the assessment of property it is by law required to value and assess. It has the right to exercise a fair discretion in expressing its judgment as to the valuation of such property; and when it has once acted, and there is no fraud shown, its judgment cannot be controlled by the writ of mandamus."

Such is the rule of the supreme court of Nebraska. It has given its interpretation to the law. By it the powers of the state board of equalization and assessment are determined and settled. That interpretation is binding on all men and corporations having property within the state subject to taxation. The Nebraska court having fixed the limitation of the powers and discretion of the state board, who will contend that the federal court should announce a different rule and fix a different limitation to the advantage of the owner of property within the state but who happens himself to be a resident of some other state?

III.

The allegation in the Bill of Complaint charging fraud against the State Board of Equalization and Assessment is not sustained by the evidence.

The record in this case discloses that the assessment of complainant's property was made by the state board of equalization and assessment in the utmost good faith, without bias or prejudice. The only testimony on the charge of conspiracy and fraud is the testimony of the members of the board themselves.

Some of them were called to testify by the complainant itself; the other members were called by the defendants. This assessment board consisted of the governor, auditor, land commissioner, secretary of state and state treasurer. Governor John H. Mickey testified that he participated in the meetings and deliberations of the board of equalization and assessment for the year 1904, and that said board was continually in session as an assessment board for about six weeks, beginning the first Monday in May; that he did not feel any bias or prejudice against the complainant or any other railroad; that he was not influenced in reaching a conclusion of the value of complainant's property by public clamor or his own interests politically. On being asked if before making the investigation as to the value of railroad properties and before considering the returns made to the board by the complainant company he or other members of the board had agreed among themselves to fix the aggregate value of all the railroads in the state at forty-six million dollars or any other sum, the governor replied, "No, sir." (Record, p. 262.) He further testified that he did not know what the aggregate value of the railroad assessments would be until after the board had fixed the value of each separately. His testimony on this branch of the case is brief, and is here inserted (Record, pp. 261-265):

Q. State your name.
A. John H. Mickey.
Q. And your age?
A. Sixty years old.
Q. Where do you reside?
A. Lincoln, Nebraska.
Q. What official position do you hold at the present time?
A. That of governor.
Q. How long have you been governor?
A. Since January, 1903.
Q. Did you participate in the meetings of the board of equalization and assessment of the state of Nebraska in the year 1904?
A. I did.

Q. Was that the first year of what is known as the new revenue law, since the new revenue law went into effect?

A. It was.

Q. Do you remember about how much time the board spent in fixing the values of the railroads in the state that year for taxation purposes?

A. Well, I think we went into session the first Monday in May, and we were almost continuously in session, with a few days excepted, for about six weeks, in the assessment of railroads.

Q. What effort did the board make to arrive at its conclusion, in a general way?

A. Well, we undertook to study very carefully the reports filed by the railroads, with other information that we could get, to inform ourselves of the value of the railroads, each separate by itself.

Q. What influence did the agitation in some of the newspapers have with you and the board, so far as you know, in fixing that valuation?

A. Well, I am not cognizant that it had any effect whatever on any member of the board or myself.

Q. Did you feel any bias or prejudice against the complainant, or any other railroad, that year in making your assessment?

A. None whatever.

Q. Were you influenced in reaching your valuation of the complainant's property, or that of any other railroad in the state, by the fact that you were a candidate for renomination?

A. I was not at all. Perhaps I might cite one instance——

Q. Well, I don't think it is necessary. Before making the investigation as to the value of the roads, and before considering the returns made to the board by the complainant company, did you or the board agree among yourselves to fix the aggregate value of the railroads in the state at $46,000,000 or any other sum?

A. No, sir.

Q. Did you know what the aggregate value of the railroads would be until after you had fixed each one separately?

A. We did not.

Q. Did you value each railroad according to the evidence you had before you, and the returns made by the road itself,

independent of the value of other railroads and of other property?

A. Well, we used other information besides the returns of the railroad in arriving at the value of each corporation.

Q. But the value of each corporation was determined independent of the value of any other railroad?

A. It was; yes, sir.

Q. Did the board ever assume that other property in the state than railroads would be assessed at any figure, and on that assumption base your valuation of complainant's property?

A. It did not.

Q. Did the board ever assume that the grand assessment roll of the state would be four hundred million dollars, or any other sum, and on that assumption base the valuation of complainant's property?

A. It did not. The matter was discussed before the board; that is, the duty of the board in assessing railroad property, and it was thoroughly understood that it was our duty to go on and assess the railroad property.

Q. Now, Governor, what information did you have before the board with respect to the value of complainant's property?

A. Well, we had their sworn returns required under the statute; I think the Burlington road complied with the statute as near as they could, with the exception perhaps of the value of the stocks, which to them, I think, was an unknown quantity, as far as the value was concerned.

Q. They so reported to you?

A. Mr. Pollard's testimony was to that effect, and I think some other testimony there.

Q. Now, in addition to the returns made by the company, what other information did you have?

A. Well, we had two financial guides, giving the value of all classes of property, corporate property, railroad properties, and we had Poor's Manual and the interstate commerce commission reports, and perhaps some other information that I don't remember of just exactly.

Q. Did you consult the market reports?

A. Yes, sir.

Q. As to the value of the stocks and bonds of complainant's property?

A. My recollection is that we made an average value of the

stocks, taking the lowest and the highest at different times.

Q. In addition to the information you have already stated, did you have the testimony of Mr. Pollard, the tax agent of complainant, with respect to their property?

A. We had Mr. Pollard before us under oath, to my recollection, that is, that the value, the definite value, of the stock could not be given. Of course, we understood that they had been exchanged, a large part of them at least—the greater part of them—for other securities at 200—I mean 100 for 200.

Q. $100 in stock for $200 in bonds?

A. Yes, and some other securities.

Q. Did you know at that time, or did you not, that those bonds were worth par?

A. My recollection is the reports showed that; yes.

Q. Now, Governor, did the board, or did it not, consider all these things that you have talked about in fixing the value of complainant's property?

A. Yes; they were all under consideration and carefully canvassed and studied.

Q. In addition to those, did you use your own information and knowledge—general knowledge of affairs and values, or not?

A. Well, the board undertook to follow the statute in determining it; felt that the board was required to use its judgment, after getting all the information it could as to its tangible value and stock and bond value, and its net earning value.

Q. Did the board do that?

A. It did.

Q. What was the first thing the board did when it began this investigation of values of complainant's property?

A. Well, after several days' session, the board finally adopted a resolution that they should take up, the first thing, the ascertaining of the value of each road, the tangible value, and go over that.

Q. Do you mean by that the value of the physical property as returned by the schedule of the company?

A. Yes, sir.

Q. Do you refer to the Weston resolution when you speak of resolution?

A. Yes, sir.

Q. What was the understanding of the board as to whether

that was to be the value of the property or not, the entire value of the property?

A. I voted for that resolution with the understanding that that was a step in considering, under the statute, the different values of the railroad property of the state, and not to be conclusive as to an assessed value, but a preliminary step to ascertain the value.

Q. The board reached a conclusion to put an estimated value on that physical property, did it?

A. Well, we went over the different classes of physical property and we made some change in what they had reported; added to it, both in the right of way and the buildings, and the bridges, perhaps. I don't remember all, but some property we increased.

Q. After you had got through with that test of value, what did you do?

A. We took up the stock and bond proposition; tried to ascertain the value of the stocks and bonds; I think the reports of the company indicated the amounts of the stocks and bonds.

Q. In making that test did you accept the mileage as returned by the company as true?

A. Yes, sir.

Q. And the total issue of its stocks and bonds as true?

A. Yes, sir.

Q. And as to the value, what did the board do?

A. You mean the value of the stocks and bonds?

Q. The stocks and bonds.

A. Well, there was considerable discussion of that. As I said a while ago, Mr. Pollard did not seem to give us definite information in regard to the stocks. It went from, I think, 160 to 165 and up to $200. I think I had some conversation with some officers of the road as to this matter; they contended it was less than $200. This fact was drawn out, if I remember right, that there had been no sale of the stocks, because they were in a merger and held by some company, I don't remember the name of the company.

Mr. Mortensen: The Northern Securities company.

The Witness: Northern Securities company, perhaps.

Q. Do you remember what the result of your deliberations was as to the value of the property in this state per mile of complainant company, as indicated by the stock and bond test?

A. Well, not definitely; I should think, say between forty-two and forty-five thousand dollars. Of course, that would be varied by the price of the stock, but think it was not less than $42,500, the estimate.

Q. Well, after considering the value of the property by that test, what did the board do then? Did you take up any other test?

A. Took up the net earnings test and discussed the rate that they should be capitalized at, in order to obtain a fair valuation of the road.

Q. Where did you get the net earnings of the company in this state?

A. From their reports.

Q. Is Exhibit 7, in evidence, the return you speak of?

A. This copy you mean (indicating)?

Q. Yes.

A. My recollection is that it was.

Q. You took that as true?

A. Couldn't do otherwise.

Q. At what rate did you capitalize the earnings in the state?

A. Well, I think the board determined 6 per cent. was a fair value on capitalization.

Q. Measured by 6 per cent. what was the value of the property in this state?

A. There wasn't much difference between that and the value by the stock and bond test; it ran from $42,000 to $45,000, is my recollection.

Q. Did the board, after considering these several tests, afterwards reach a conclusion as to what the road should be assessed at?

A. They did.

Q. Do you remember what that was per mile?

A. $38,750, I think it was, if I remember right—that is my recollection.

Q. That is the figure at which you remember it was assessed?

A. Yes, sir.

Q. Was that your judgment and that of the board at the time, agreed upon by all of you to be the value of the road?

A. The board fixed that as being in their judgment a fair value of the property.

Q. And in that, did you intend to, and did you, assess the

property locally assessed, or include property locally assessed?

A. No; we deducted such as the Havelock shops and other property not on the right of way.

Q. That represented the average value per mile of the entire property of the company in this state?

A. Yes, sir.

Q. How did you distribute that over the subdivisions and branches?

A. After we arrived at the total value of the property in system, we asked Mr. Pollard to assist us in making the distribution over the different roads in the system.

Q. In the distribution you put a higher valuation on some miles than you did on others?

A. Yes; we distributed it in our judgment—we had no net earnings whatever for each of these, so that we could tell. The net earnings were returned in a gross amount for the state and the board was at a great disadvantage in making that distribution, and they asked Mr. Pollard, and I think he agreed to give us an estimate at one time.

Q. Did Mr. Pollard or any other representative of the company protest or object to this distribution?

A. No; in fact we rather expected him to help us in making this distribution and tried to get him to do so.

On this branch of the case State Treasurer Mortensen testified as follows (Record, pp. 250-255):

Q. There was considerable agitation that year (1904) with respect to the assessment of railroads in the newspapers, was there not?

A. The newspapers agitated it somewhat; yes, sir.

Q. That was the first year the new law went into effect, wasn't it?

A. Yes, sir.

Q. You had been on the assessment board the years previous to that, hadn't you, while you were state treasurer?

A. 1903, yes, sir.

Q. 1902?

A. No, sir.

Q. 1903 was your first assessment?

A. Yes, sir.

Q. There was agitation that year the same way, was there not?

A. Not to such a large extent.

Q. In fixing the value of complainant's property, with other railroads in this state, what influence did this agitation have on you, if any?

A. It had the influence that it made us examine closer into the question and examine the proofs before us and probably study the case more thoroughly than we would otherwise.

Q. Did it stimulate you to put the value of the railroad higher than you thought it should be?

A. No, sir.

Q. Were you influenced to assess the railroads high because you were a candidate for re-election that year?

A. No, sir.

Q. Now, Mr. Mortensen, was there any agreement between you and the other members of the board with respect to what the valuation of complainant's property should be, and that of other railroads in this state, prior to your examination into the facts?

A. Certainly not. Not prior to the finding of the assessment—the final finding.

Q. What did you consider in fixing the value of complainant's property that year?

A. We took into consideration the tangible property which consisted, of course, of the roads and equipments and other property. We also took into consideration the stock and bond values and the net earnings.

Q. The complainant company made return to your board of all its property that year?

A. Yes, sir.

Q. Schedules of its rolling stock and all its physical property in the state?

A. Yes, sir.

Q. Did it make a return of its stock and bond issues?

A. Yes, sir.

Q. Did it make a return of the earnings of the company, gross and net, in the state?

A. Yes, sir.

Q. Did it file with your board the annual report for the year previous, of the company?

A. Yes, sir.

Q. What of the items that we have just enumerated did the

board consider in fixing the value of the property—all of them?

A. All of them, yes, sir.

Q. In addition to that information did you examine any other documents, such as Poor's Manual?

A. Oh, yes, and such other information as we could get. Poor's Manual, and Clew's Investment Guide—I think that is the name of it—Investment Guide, and also the report of the interstate commerce commission, and different documents as we could get, bearing on the earnings and value of the road, and so forth.

Q. In addition to those things you have enumerated, did you also receive the testimony of representatives of the roads on matters in addition to and explanatory of matters contained in the report?

A. We sometimes had a representative of the road before us to explain matters that we did not understand.

Q. Were they under oath before you?

A. I think they were most of the time.

Q. There was no record made as to what they testified to?

A. I couldn't say as to that—no, I think not.

Q. In finally reaching your conclusion would you say that your conclusion was based on all the information that you have just enumerated in this examination, or not?

A. Certainly it was, yes, sir.

Q. Now, Mr. Mortensen, what was the first thing you did when you began investigating the values of railroad property that year?

A. The first thing was to examine the tangible—ascertain the value of the tangible property under the resolution offered by Auditor Weston.

Q. You remember that resolution do you?

A. Yes, sir.

Q. Was it the purpose of that resolution to ascertain as a final conclusion the value of the tangible property and have it assessed at that value?

A. I understood it as such when it was first introduced, and for that reason offered another resolution to include all the property, tangible and intangible, but being assured by Mr. Weston and other members that the intention was only to comply with the statute, I consented and participated in the deliberation under that resolution.

Q. Then if I understand you correctly you first investigated the value of the physical property as returned in the schedules of the complainant company that year, did you not?

A. Yes, sir.

Q. Was it understood at the time you were making that examination that that was simply to be one of the factors of the value of the property?

A. That was the way it was explained to me after the resolution had been introduced and argued.

Q. Now, then, the board ended that investigation of the value of the physical property by reaching, or agreeing on the conclusion amongst yourselves as to what the physical property should be estimated at, in accordance with the resolution of Mr. Weston?

A. Yes, sir.

Q. Now, after that what did you do, Mr. Mortensen, the board?

A. We took into consideration the stock and bond values.

Q. Of the company?

A. Of the company, yes, sir.

Q. Did the company return its total issue of stock and bonds to the board?

A. Yes, sir.

Q. You accepted those as true, did you?

A. Yes, sir, we certainly did, with such other information as we had before us.

Q. Well, when you came to fix the value of the stocks and bonds you used your own judgment as to the value, did you not?

A. We used our own judgment according to the information we were able to obtain from the market value of such stocks and bonds.

Q. What did the company itself say as to the value of the stocks and bonds, if you remember as to the stocks?

A. The company claimed to be ignorant of the value of the stocks and bonds—especially of the stock, not of the bonds.

Q. But of the stock?

A. Of the stock, yes, sir.

Q. Do you remember at this time what value the board put on the stocks?

A. We had all kinds of estimates of value, all along from seventy odd cents up to $2.00.

Q. You mean $1.70?

A. Yes, $170.00 up to $200.00 on each share.

Q. On each share?

A. Yes, sir.

Q. Do you remember what the conclusion of the board was as to the value of the railroad per mile in this state, applying the stock and bond test?

A. Of course, that was based simply on our information as to the value of the stocks. It would vary all along from 43 to a little over 46 thousand dollars a mile, according to the value that was placed on the stock.

Q. Did you rely on the information contained in the report marked Exhibit 1, being the 49th annual report of the board of directors of the Chicago, Burlington and Quincy Railway company to the stockholders, in considering the stock and bond value of the road?

A. Yes, sir; we examined that and compared it with their own statement and found it comparatively, if not exactly, correct. I think it was just the same as contained in the report to the board.

Q. And under that test the value of the road, did I understand you to say, was in this state all the way from 40 to 43 and 46 thousand dollars a mile?

A. Yes, say $45,000.

Q. Depending on the value that you gave the stocks and bonds?

A. Yes, sir.

Q. Did the board accept that as the value of the road?

A. No, sir.

Q. Then what did you do?

A. Well, we took into consideration other matters. We compared the value of the roads in this state with the value of the road in other states, as near as we were able to ascertain, with the road in Wyoming and Montana and South Dakota and Minnesota—they have a few miles there, I guess—and in Iowa, Illinois, Missouri, Wisconsin, Kansas and Colorado.

Q. Did you consider Exhibit 7, the return made by the company of the earnings gross and net, in the state of Nebraska?

A. Yes, sir.

Q. Do you remember approximately about how much the net earnings of the complainant company, the Burlington, were in the state of Nebraska?

A. No, I do not.

Q. Well, approximately?

A. Somewhere about $2,400 or $2,500 a mile.

Q. In estimating the value of the road by this test, how did you do it?

A. We computed it by several tests—with several rates of interest, 4, 5 and 6 per cent. The 6 per cent. rate came out about equal with the value of the stock and bond test, there wasn't very much difference.

Q. You mean you capitalized the net earnings per mile at six per cent.?

A. Yes, sir.

Q. And it brought approximately the same result as the stock and bond test?

A. Yes, sir.

Q. Now these tests, Mr. Mortensen, the stock and bond test and the net earning test—did you accept either one as the value of the road?

A. No, sir, we did not.

Q. What did you do with respect to them?

A. Well, as I say, we sat together as a board and we had different ideas, but we finally agreed on a value for the road.

Q. Well, what was the understanding of the board among themselves with reference to whether or not your final judgment should reflect the value of the road by any of those tests?

A. There was no agreement or understanding to that effect.

Q. Was it or was it not understood that you would consider all those several tests?

A. Certainly.

Q. It was so understood?

A. Yes, sir, it was so understood and it was done that way.

Q. Did you or the board, as far as you know, assess the complainant's property, or the railroads of the state, that year, on the assumption that other property would be assessed and the grand assessment roll would reach $400,000,000?

A. We assessed it on the theory that it would be assessed at its fair value, not on any other proposition, that is in regard to what the grand assessment would be. That had nothing to do with the assessment of the railroads.

Q. You fixed the value of the railroad property, you say, independent of what the other property might be?

A. Why we certainly did. It was assessed before we knew anything of the value of the other property in the state.

State Auditor Weston was called as a witness by the complainant and on this subject testified as follows (Record, pp. 238-242):

Q. The board considered everything that was filed before it, didn't it, Mr. Weston?

A. I think so, yes.

Q. Then your testimony is that if this was filed before the board, the board gave it some consideration?

A. Why, I think so; yes, sir.

Q. Mr. Weston, about how many weeks was your board in session that year?

A. We were in session in the neighborhood of six weeks, most of the time from the first Monday in May until beyond the middle of June.

Q. During that time you were giving consideration to the reports of the company and investigating the value of this railroad property in Nebraska?

A. Yes, sir.

Q. Was your board in session from day to day?

A. Most of the time; there would occasionally be an intermission of a day.

Q. What efforts and endeavors did you, together with the other members of the board, make to ascertain the value of these properties?

A. You are speaking of the Burlington property?

Q. Yes.

A. Called in the railroad people before the board to be heard, and a number of times called them before us and interrogated them under oath.

Q. During all those times were you exercising your judgment with reference to the subject under investigation?

A. I can answer for myself individually that I was.

Q. Were you at any time influenced in any respect by public clamor or agitation or the public press?

A. I don't think I was.

Q. You were endeavoring simply to ascertain the fair value of the railroad property for that year in this state?

A. Yes, sir.

Q. Were you?

A. Yes, sir.

Q. Did you intend at any time to assess the property of this company located in any other state?

A. Did you intend to do that?

Q. Did you as a member of the board?

A. No, sir; I did not.

Q. Did you, in your judgment, assess any of their property that was located outside of this state that year?

A. No, sir.

Q. This was the first year under the operation of what is known as the new revenue law, wasn't it?

A. Yes, sir.

Q. Was the assessment that you finally, or that the board with your consent and participation finally made, determined by what the prior assessments of the railroads had been in prior years?

A. No, sir; not at all.

Q. Now, then, when you proposed this resolution of inquiry, first as to the value of the tangible property of this company, that was simply as a preliminary step, was it not, in the course of your investigation of that subject?

A. Yes, sir; it is so recited in the resolution.

Q. It was not a purpose of yours in introducing that resolution to first ascertain, as a final fact, the value of the tangible property and afterwards to ascertain as a final fact the value of the intangible property and add the two together, was it?

A. No, sir, I think not. My view in the matter, in introducing the resolution, was simply that we could go into all the elements of property thoroughly; that was my view of the matter.

Q. That was what you were trying to do?

A. Yes, sir.

Q. And these conclusions that you reached, which you and the board agreed upon as a tentative estimate of the value of the tangible property, was simply the first step in the investigation, wasn't it?

A. Yes, sir.

Q. And it is your judgment and was your judgment at the time that the tangible property of this company in this state was the figures, the total, that are on that tabulated statement?

A. Yes, sir. * * *

Q. Now, then, when you had determined or estimated for

the time being the value of the tangible property, then you, with the board, proceeded to find the value of their property in Nebraska by using the stock and bond test?

A. Yes, sir; we were on that day in and day out for two or three weeks.

Q. You did not proceed to ascertain the stock and bond value of the road in Nebraska for the sole purpose of ascertaining the value of the franchise, did you, but rather for the purpose of ascertaining the value of the property?

A. The actual value of the property.

Q. And when you speak of finding the franchise value by subtracting from the stock and bond value the value of the tangible property you simply state that as one of the methods used to find that intangible value?

A. Yes, sir.

Q. You do not pretend to say that the board made any figures at all as to what the intangible property would be, do you, the franchise value?

A. No, sir; we made no figures; made no record of any such figures.

Q. Now, then, in figuring the stock and bond value of the road I understood you to say you did not remember what value you put on the capital stock of the company?

A. No, sir.

Q. All you remember is that the result of your judgment was that it was worth about $43,000 a mile?

A. Forty to forty-three, yes, sir; I know we had a good deal of controversy as to the value of the stock, and what figure we ultimately fixed upon has escaped my mind; I don't remember that.

Q. You knew, did you, at that time, that the complainant's stock was convertible into bonds secured by the Great Northern and Northern Pacific, two dollars for one?

A. We knew, of course—we were cognizant—had become cognizant, through the press, that something of that kind had happened a year or two before that.

Q. And you also knew, didn't you, that it was a matter of common knowledge that these bonds that were exchanged for stock, two dollars in bonds for one dollar in stock, were paying 4 per cent, didn't you?

A. I can't say that I had that precise knowledge.

Q. Well, wasn't that public knowledge; wasn't that information you had in your discussions there?

A. I can't swear positively that it was, in regard to the amount the bonds were paying.

Q. Didn't the report of the company to you show that all bonds outstanding were—all these guaranteed bonds—were paying 4 per cent.?

A. Possibly that is true. The report will show that, if it is true.

Q. Well, Mr. Weston, there were no stocks of this company on the market that year that you knew of, were there?

A. Not that we could ascertain.

Q. The company told you that it had no market value that they knew of?

A. Yes, sir.

Q. That left you, under the law, obliged to ascertain as best you could what the actual value of that stock was?

A. Yes, sir.

Q. Now that you did?

A. Yes, sir.

Q. Didn't you?

A. Yes, sir.

Q. Then you estimated the value of the property in Nebraska by the stock and bond test?

A. Yes, sir.

Q. Now, then, when you came to use the net earning test, you used alone the net earnings as returned to you by the company?

A. Yes, sir.

Q. In this state?

A. Yes, sir.

Q. Not in any other state?

A. Not in any other state.

Q. And capitalized at 6 per cent. would make an average mileage value in the state of something over $40,000?

A. That is my recollection.

Q. Capitalized at 5 per cent. it would be about what in round numbers?

A. Capitalized at 5 per cent. on the basis of $2,500 per mile—that is about what the report shows—it would be $50,000 per mile.

Q. In your judgment, at that time, you thought a 6 per cent. capitalization was a fair basis?

A. Yes, sir. That was the capitalization that had been adopted by some of the courts, and we were guided by that.

Q. Then, if we accept the stock and bond test, or the net earning test, the value of this company's property in Nebraska that year was over $40,000 per mile?

A. Yes, sir; the way the board figured it out.

Q. As a matter of fact, the road was assessed for several thousand dollars a mile less than that finally?

A. Yes, sir.

Q. Now, when it came to the distribution of the value that the board finally fixed on this property over its mileage in Nebraska, was there anything said or done by the board towards distributing a franchise value over any of that mileage?

A. No, sir.

Q. You were simply distributing as in your judgment you thought was right, the value that you had determined of the whole property in this state?

A. Yes, sir; the board did that.

Q. And you distributed it to these constituent companies, with the consent, didn't you, of the railroad company?

A. My recollection is that it was the opinion of the company, or the representative of the company, that there should be a distribution as between so-called main line of franchise; that is, that the system should not be assessed as a unit with equal valuation per mile throughout the entire system. I think that was the attitude of the companies.

Q. Now then, to sum up: As I understand your testimony, you first made an estimate of the value of the tangible property of the company in Nebraska?

A. Yes, sir.

Q. Then you made an estimate of the value of the property in Nebraska, applying the stock and bond test?

A. Yes, sir.

Q. Then you made an estimate of the value of the property in this state, applying the net earning test?

A. Yes, sir.

Q. Then the board considered those several estimates, and in their judgment finally fixed the value of the railroad company at the value recited in the records of the board?

A. Yes, sir.

Q. Is that true?
A. Yes, sir.

It was stipulated between counsel that the testimony of Secretary of State Marsh, who was absent at the time, would be the same, in substance, as the testimony of Auditor Weston, and that the court might consider the facts testified to by Auditor Weston as being the testimony of Secretary of State Marsh. (Record, p. 248.)

The testimony of Land Commissioner Follmer was in harmony with the testimony of the other members of the board (Record, p. 505.)

From this testimony it must be clear that the members of the board which assessed the property of complainant in the state of Nebraska in 1904 acted in perfect good faith, and gave to the subject before them the best consideration of which they were capable. The charge of fraud and conspiracy is not sustained by the testimony of a single witness anywhere in the record. The members of the board never conspired together or agreed among themselves at any time to arbitrarily fix the value of complainant's property, or that of any other railroad in the state, for purposes either selfish or political, or in obedience to public clamor.

It is affirmatively shown by the testimony quoted that the statute was carefully and impartially enforced; that the board and all the members thereof considered the three elements or factors which go to make the value of railroad property; namely, the physical property, as shown by the returns of the company itself, the stocks and bonds and their value, and the earnings. Under the testimony quoted it appears that the board considered and weighed all three of these elements of value, the result of which was an assessment of complainant's property within the state of Nebraska.

IV.

The methods authorized by the Nebraska law and followed by the State Board of Equalization and Assessment are sanctioned by the courts of the country.

It is the contention of complainant that the state board of equalization and assessment violated the law in giving consideration to the value of the stocks and bonds of the complainant and its net earnings. On this subject the supreme court of the United States is the *State Railroad Tax Cases,* reported in 92 U. S. 575, speaking through Mr. Justice Miller, said:

"It is therefore obvious, that, when you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock, and its franchises; for these are all represented by the value of its bonded debt and of the shares of its capital stock.

"This would of itself be, perhaps, the fairest basis of taxation for the state at large, if all railroads were solvent and paid the interest promptly on their funded debt."

The above rule has frequently been reaffirmed by the courts, and in no instance and at no time has it ever been abrogated or modified. In *Pittsburg R. Co. v. Backus,* 154 U. S. 421, the opinion among other things says (p. 430):

"When a road runs through two states it is, as seen, helpful in determining the value of that part within one state to know the value of the road as a whole. It is not stated in this statute that when the value of a road running in two states is ascertained the value of that within the state of Indiana shall be determined absolutely by dividing the gross value upon a mileage basis, but only that the total amount of stock and indebtedness shall be *presented for consideration by the state board.* Nevertheless, it is ordinarily true that when a railroad consists of a single, continuous line, the value of one part is fairly estimated by taking that part of the value of the entire road which is measured by the proportion of the length of the particular part to that of the whole road. This mode of division has been recog-

nized by this court several times as eminently fair. Thus, in *State Railroad Tax Cases,* on page 608, it was said:

"'It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole.'

"And again on page 611:

"'This court has expressly held in two cases, where the road of a corporation ran through different states, that a tax upon the income or franchise of the road was properly apportioned by taking the whole income or value of the franchise, and the length of the road within each state, as the basis of taxation. *The Delaware Railroad Tax Case,* 18 Wall. 206; *Erie Railway v. Pennsylvania,* 21 Wall. 492.'

"The mileage basis of apportionment was also sustained in *Western Union Telegraph Co. v. Massachusetts,* 125 U. S. 530; *Pullman's Palace Car Co. v. Pennsylvania,* 141 U. S. 18; *Maine v. Grand Trunk Railway,* 142 U. S. 217; *Charlotte, Columbia, &c. Railroad v. Gibbs,* 142 U. S. 386; *Columbus Southern Railway v. Wright,* 151 U. S. 470."

Growing out of and closely related to the principle involved in the stock-and-bond test, is the rule of ascertaining the value by a capitalization of the net earnings. This rule also has the approval of the courts.

The case of *Kansas City, Ft. S. & M. R. Co. v. King,* 57 C. C. A. 278, decided June 19, 1902, contains a very full discussion of the various tests and methods for the determination of the value of railroad property. In that case the assessment board in ascertaining the value of complainant's property, found, first, the aggregate value of the company as a system wherever found; second, deducted exemptions and localized property in the state, divided the remainder by the aggregate number of miles of the company wherever situated, and multiplied the quotient by the aggregate number of miles of main and side track in the state. In ascertaining the value of the entire property of the company wherever situated it considered and found the value of the stock, the value of the bonds, and then the value

of the road on a capitalization of the net earnings. From these separate findings it struck an average. The circuit court of appeals held there was no ground in equity for an injunction, and sustained the tests followed by the board in ascertaining the value of the property.

Again, in what are known as the *"Traction Company Cases,"* reported in 114 Fed. 557, the circuit court of the United States in its decree authorized an assessment upon the net earnings of the traction companies capitalized at 6 per cent.

Again, the supreme court in *Adams Express Co. v. Ohio State Auditor,* 166 U. S. 185, speaking through Mr. Justice Brewer, said:

"Now, it is a cardinal rule which should never be forgotten that whatever property is worth for the purposes of income and sale it is also worth for purposes of taxation. * * * Now, the same reality of the value of its intangible property exists when a company does not confine its work to the limits of a single state. Take, for instance, the Adams Express Company. According to the return filed by it with the auditor of the state of Ohio, as shown in the records of these cases, its number of shares was 120,000, the market value of each $140 to $150. Taking the smaller sum, gives the value of the company's property taken as an entirety as $16,800,000. In other words, it is worth that for the purposes of income to the holders of the stock and for purposes of sale in the markets of the land; but in the same return it shows that the value of its real estate in Ohio was only $25,170; of real estate owned outside of Ohio $3,005,157.52; or a total of $3,030,327.52; the value of its personal property in Ohio $42,065; of personal property outside of Ohio $1,117,426.05; or a total of $1,159,491.05, making a total valuation of its tangible property $4,189,818.57, and upon that basis it insists that taxes shall be levied; but what a mockery of substantial justice it would be for a corporation, whose property is worth to its stockholders for the purposes of income and sale $16,800,000, to be adjudged liable for taxation upon only one-fourth of that amount. The value which property bears in the market, the amount for which its stock can be bought and sold, is the real value. Business men do not pay cash for property in moonshine or dreamland. They buy and pay for that which

is of value in its power to produce income, or for purposes of sale.

"It is suggested that the company may have bonds, stocks or other investments which produce a part of the value of its capital stock, and which have a special situs in other states or are exempt from taxation. If it has, let it show the fact. Courts deal with things as they are, and do not determine rights upon mere possibilities. If half of the property of the Adams Express Company, which by its own showing is worth $16,000,000 and over, is invested in United States bonds, and, therefore, exempt from taxation, or invested in any way outside the business of the company and so as to be subject to purely local taxation, let that fact be disclosed, and then if the state of Ohio attempts to include within its taxing power such exempted property, or property of a different situs, it will be time enough to consider and determine the rights of the company. That if such facts exist they must be taken into consideration by a state in its proceedings under such tax laws as are here presented has been heretofore recognized and distinctly affirmed by this court. (*Pittsburg, C. R. Co. v. Backus,* 154 U. S. 421, 443; *Western Union Telegraph Co. v. Taggart,* 163 U. S. 1, 23; *Adams Express Co. v. Ohio,* 165 U. S. 194, 227.) Presumably all that a corporation has is used in the transaction of its business, and if it has accumulated assets which for any reason affect the question of taxation, it should disclose them. It is called upon to make return of its property, and if its return admits that it is possessed of property of a certain value, and does not disclose anything to show that any portion thereof is not subject to taxation, it cannot complain if the state treats its property as all taxable."

It will be observed by the testimony of the members of the board hereinbefore quoted that while the board gave consideration to the earnings and to the stocks and bonds of the complainant, still it fixed the value of complainant's property at a much less sum than its value tested by the stock and bond or the earnings test. Each and every member of the board testified that under the stock and bond test the road was worth upwards of $45,000 per mile, and measured by the net earnings test approximately the same value. As a matter of fact the road was assessed at several thousand dollars less per mile. The conclu-

sion is irresistible that the board did not value complainant's property alone by the stock and bond method, nor alone by the earnings test, nor alone by the physical property test. Therefore the complainant suffered no injury, and no law or constitution, state or federal, was offended by the judgment of the state board in assessing its property in Nebraska in the year 1904. The evidence shows conclusively that the property of complainant in Nebraska in 1904 was not assessed in excess of its true value.

V.

The evidence shows conclusively that the property of complainant was assessed below its true and full value by the State Board.

The evidence upon which the board acted in making the assessment complained of may be summarized as follows:

1. The 49th annual report of the board of directors of the complainant company to its stockholders (Record, p. 314).

2. The schedules and returns of the complainant made to the state board of equalization and assessment, touching all its physical property in the state of Nebraska.

3. The complainant's return touching its stock and bond issues. (Record, p. 314.)

4. The complainant's return of the earnings of the company in the state of Nebraska (Record, p. 305).

5. Poor's Manual, Clew's Investment Guide, the report of the interstate commerce commission, the market reports, together with the sworn testimony and explanation of Mr. Pollard, the tax agent of the complainant company.

These items of information and testimony were all considered and weighed by the state board in reaching its conclusion, as shown by the testimony of the members of the board hereinbefore quoted. That the state board not only exercised in good

faith its own judgment in fixing the value of complainant's property on the information and testimony enumerated, but that it also assessed the property at less than its full actual value, is shown by the testimony of the expert witness L. E. Wettling, called by the defendants. This witness does not pretend to have examined the physical property of the complainant, nor its returns touching the same. His testimony is based on the information given by the complainant to the state board touching its stocks and bonds and their value, together with the return made by the complainant showing its earnings in the state. The testimony of this witness begins at page 283 of the printed record. He testified that he was treasurer of the Farmers & Merchants Insurance Company and acting cashier of the Farmers & Merchants Bank of Lincoln, and had been so engaged for several years. That he had been employed as an expert by the Union Pacific Railroad Company to examine into the affairs of the Pacific Express Company. That he had had extensive experience as an accountant. That for years he had followed the market reports in a general way, and was a subscriber to some of the leading financial journals of the country. That he was acquainted with and had made an examination into the affairs of the Chicago, Burlington & Quincy Railway Company, the complainant in this case. That in making such examination he had had reference to the 49th annual report of the directors of said company to its stockholders, Poor's Manual, the Commercial & Financial Chronicle, reviews and tables, Dunn & Company's reports, the Wall Street Journal, and various affidavits in the hands of the state board of equalization, and other papers and documents which he did not recall.

He testified further that he had examined the bill of complaint in this case; that he was acquainted with the tests most generally used and relied upon by the public investing in railroad properties, namely, the net earnings test, the stock and bond test, and the cost test. The result of his computations is shown by his several exhibits made a part of his testimony. The exhibit

showing the value according to the cost test is No. 17, found on page 286 of the record, and is as follows:

Exhibit No. 17, C. W. P.

C. B. & Q.

COST.

Ref. 49th Annual Report, and Poor's Manual.		
Cost of road and equipment		$302,654,666.85
Cost of securities and investments in controlled lines		10,926,110.09
Total cost		$313,580,776.94
Miles owned and controlled, *8,112.77.		
Average cost per mile		38,652.73
C. B. & Q. lines proper. See Poor's Manual, p. 334.		
Miles owned, 5,701.26; cost		302,654,666.85
Average cost per mile		53,085.57

*Only that per cent of mileage of controlled lines should be included which would be represented by per cent of stock owned.

The value of the road according to the stock and bond test, after allowing all deductions claimed in the bill of complaint, may be found at page 291 of the record in Exhibit No. 20, which is as follows:

Exhibit No. 20, C. W. P.

C. B. & Q.

STOCK AND BOND VALUE.

Basis: Stock, 1.80; bonds, par.		
Stock, 110,839,100 at 1.80		$199,510,380.00
Bonds, see Bill of Complaint, p. 32		156,050,900.00
		$355,561,280.00
Deductions claimed. See Bill of Complaint.		
pp. 13-14	$29,741,610.41	
pp. 21-22	10,295,703.23	
p. 23	731,500.00	40,768,813.44
		$314,792,466.36

pp. 28-29, value of 2d, 3d and 4th track east of Missouri river	2,000,000.00
Net value	$312,792,446.36
Mileage owned and controlled, 8,112.77.	
Average value per mile	38,555.56
Not deducting value of 2d track	38,802.00
On basis of 2.00 for stock, bonds par.	
Total stock	$221,678,200.00
Bonds	156,050,900.00
	$377,729,100.00
All deductions	42,768,813.64
Net value	$334.960,286.36
Average per mile	41,288.03

If the stock had been figured at $200 a share, the value assumed by the witness Browne, called as an expert by the complainant company, the value of the road according to the stock and bond test would have been about 30 million dollars higher than the sum shown in the exhibit.

The value of the road according to the net earnings test is shown in exhibit No. 24, found at page 305, and is as follows:

Exhibit No. 24, C. W. P.

C. B. & Q.

NET EARNINGS.

2,611.23 Miles, Nebraska.

See Respondent's Exhibit No. 7.

Net earnings in Nebraska for year ending June 30, 1903	$6,771,921.24
Average net earnings per mile	2,593.39

This would represent a capitalization on—

Basis of	Total.	Per mile.
4 per cent	$169,298,031.00	$64,834.75
5 per cent	135,438,424.80	51,867.80
6 per cent	112,865,354.00	43,223.16

After considering the several factors that enter into the value of railroad property, this expert was asked what in his judgment

the value of complainant's property in Nebraska was on or about March 30, 1904, exclusive of all their property locally assessed, to which the witness replied, "In my judgment the property in Nebraska referred to is worth about $115,000,000, or about $44,000 per mile." (Record, p. 305.) So that according to the testimony of this disinterested and impartial witness, whose judgment as an investor in securities is competent and persuasive, complainant's property should have been assessed in Nebraska at $44,000 per mile, instead of $38,750 per mile, the sum fixed by the state board.

The expert called by the complainant testified at great length with respect to the value of complainant's property in Nebraska. He is the only witness who puts a value upon the property less than that fixed by the state board. His judgment, however, is seriously impaired by the witness himself when he undertakes to distribute the stocks of the company to certain subdivisions of the mileage. This witness denies that the stock of the C. B. & Q. attaches equally to each and every mile of the road, but apportions the stock in proportion to the gross earnings of certain subdivisions of the road. This is a novel and unheard of process, and of course is only resorted to in this case because it is necessary in order to keep the stock value of the Nebraska lines down to a small sum, leaving the larger sum of stocks to be distributed upon the mileage outside of Nebraska. His judgment is also impaired again when he says that the franchise value of the railroad is merely nominal. On cross-examination the witness was asked this question (Record, p. 118):

"Q. Did I understand you to say that the entire franchise value of the complainant, proper, in Nebraska, is only $25,000?
"A. About $5,000. You can get a new franchise for that."

Any witness who denies that a railroad company has a franchise value which may exceed its physical property value flies in the face of every decision of this court since the question was first raised, and his judgment as to the value of the property for taxation purposes deserves very little, if any, consideration.

In discussing the testimony of this expert witness we do not for a moment intend to surrender our position that it is immaterial what any witness says property is worth in a case of this character, when it is shown that the state board of equalization and assessment determined and fixed the value of the property assessed acting in good faith.

VI.

Equity will not enjoin the collection of taxes on account of the under-assessment of other property by taxing officers, unless it appears that such under-valuation is the result of system, design, intention, habit, custom, or agreement.

It is insisted by counsel that the complainant is entitled to the relief sought because the local taxing officers throughout the state of Nebraska under-valued and under-assessed the property within their jurisdictions. Our reply to this contention is, first, that unless such under-valuation is the result of design, custom, system, habit, agreement, or intention on the part of the local taxing officers, equity affords no relief. This rule, we think, is well established by the authorities. In the trial court counsel for complainant relied chiefly upon *Taylor v. Louisville & Nashville R. Co.*, 88 Fed. Rep. 350; but a careful examination of the opinion of the court in that case discloses that the court had no intention of modifying or abrogating the well-established rule that before equity will interfere, design or habit, custom or agreement on the part of the taxing officers to under-assess property must be alleged and proved, for in that opinion we find the following language:

"Equity will not relieve against an assessment merely because it happens to be at a higher rate than that of other property; that such inequalities, *due to mistake, to the fallibility of human judgment*, or to other accidental causes, must be borne, for the reason that absolute uniformity cannot be obtained; that, in other words, what may be called 'sporadic cases of discrimination' can not be remedied by the chancellor. He can only interfere when it is made clear that there is, with respect to certain

species of property, *systematic, intention and unlawful undervaluation* for taxation by the taxing officers, which necessarily effects an unjust discrimination against the species of property of which the complainant is an owner. The reason for the distinction is obvious. Occasional and accidental discriminations are inevitable in every assessment, and are not likely to continue, because not the result of an *illegal purpose* on the part of any one. If equitable interference in such cases could be invoked, the obstruction to the collection of taxes would be so frequent as to be intolerable. More than this, an action to enjoin a tax is a collateral attack upon the judgment of a *quasi*-judicial tribunal; and it cannot be justified *except on the ground of an obvious violation of law or something equivalent to fraud.* It does not lie where the injury complained of arises only from the *erroneous, but honest,* judgment of the lawfully constituted tax tribunal. The interference by the chancellor in the case at bar * * * rests on *something equivalent to fraud* in the tribunal imposing the tax. The various boards whose united action is by law intended to effect a uniform assessment on all classes of property are to be regarded as one tribunal, and the whole assessment on all classes of property is to be regarded as one judgment. If any board which is an essential part of the taxing system *intentionally, and therefore fraudulently,* violates the law by uniformly under-valuing certain classes of property, the assessment by other boards of other classes of property at the full value, though a literal compliance with the law, makes the whole assessment, considered as one judgment, a fraud upon the fully assessed property." (*Taylor v. Louisville & N. R. Co.*, 88 Fed. Rep. 350.)

In *German National Bank v. Kimball*, 103 U. S. 732, speaking for the court on this subject, Mr. Justice Miller said:

"The bill is made up of averments which are intended to show that the valuation of the property of other persons in the same town, made by the same assessor, is less in proportion to its actual cash value than that of plaintiff's shares; that the same is true in other parts of the state; that some corporations are favored in this valuation, and that certain classes of property are favored in a general way. But there is no distinct averment that the shares of this bank are valued higher for the purpose of taxation than other moneyed capital generally, though this is alleged in regard to particular instances. The allegations are pretty full that the assessments are partial, unequal and unjust,

and do not result in the uniformity of taxation which the constitution of Illinois requires."

After citing the cases of *Pelton v. Commercial National Bank*, 101 U. S. 143, and *Cummings v. Merchants National Bank*, 101 U. S. 153, Mr. Justice Miller further stated in the Kimball case:

"It is held in these cases that when the inequality of valuation is the result of a statute of the state *designed* to discriminate injuriously against any class of persons or species of property, a court of equity will give appropriate relief; and also where, though the law itself is unobjectionable, the officers who are appointed to make assessments *combine together and establish a rule or principle of valuation*, the necessary result of which is to tax one species of property higher than others, and higher than the average rate, the court will also give relief. *But the bill before us alleges no such agreement or common action of assessors, and no general rule or discriminating rate adopted by a single assessor*, but relies on the numerous instances of partial and unequivocal valuations which establish no rule on the subject."

Also, in the case of *New York v. Barker*, 179 U. S. 190, this court held, Mr. Justice Peckham delivering the opinion:

"Under these statutes the tax upon real estate must be imposed in all cases, both of individuals and of corporations, upon its full and true value as found by the assessors. In the case of the individual, however, no resort can be had to any other proceeding by which that tax can be increased by any subsequent assessment upon the difference between the assessed and the actual value of the real estate, if any there should be. In the case of corporations, on the contrary, under the construction given the statute of 1857 by the Court of Appeals, in the last above cited case, if the real estate should be mistakenly assessed under the general statute at an under-valuation for purposes of separate taxation, the difference between the assessed and the actual value of the real estate may be reached in making an assessment upon the actual value of the capital under the act above mentioned. By such a result, it is claimed, the company is denied the equal protection of the laws. It must be remembered there is no claim made that in any event the corporation is taxed upon any property not legally taxable, or that it is taxed beyond the actual value of its property as provided by law. The only claim is that in this opportunity to correct a mistaken assessment upon its real estate in the case of a corporation when as-

sessed upon its capital, which does not exist in the case of an individual, the corporation is denied the equal protection of the laws. This is the sole federal question in the case.

"It is seen that the laws of the state provide for no under-valuation of real estate owned by either individuals or corporations. Those laws provide in terms for the assessment of all real estate at its actual value, while the whole force of the contention of the plaintiff in error is based upon the fact of under-valuation, although it is in the very teeth of the statute, and is a plain violation of its provisions. If there were no under-valuation of real estate, or, in other words, if the laws of the state were complied with, the question sought to be raised by the plaintiff could not arise. The failure of the assessors in this one instance to assess the real estate of the company for separate taxation at its actual value, and its assessment at that value in assessing for taxation the actual value of the capital stock of the company, could obviously work no denial of the equal protection of the laws of the company, if individuals were in fact assessed for their ownership of real estate at its full and true value, as required by law. If the law were faithfully carried out, no harm could in any event come to the plaintiff in error by this subsequent assessment of its real estate at its full value, for it would only pay the same as individuals, they being assessed upon their real estate at its full value. To raise the question which the plaintiff in error seeks, it was, therefore, obviously necessary to *allege* and *prove* as a fact that there was *habitual violation* of law by under-valuation; that, in the language of Mr. Justice Miller, in *Albany County Supervisors v. Stanley*, 105 U. S. 305, 318, the assessors *'habitually and intentionally, or by some rule prescribed by themselves or by some one whom they were bound to obey,'* under-valued real estate for assessment in New York City; or, as stated in *Cummings v. Merchants Nat. Bank*, 101 U. S. 153, that a *rule* or *system* of valuation had been adopted by those whose duty it was to make the assessment which was *designed to operate unequally and to violate a fundamental principle of the constitution*, and that such rule had been applied, *not solely to one individual*, but to a *large class* of individuals or corporations. It was said in that case that this was precisely the case made by the bill, and, if supported by the testimony, the court thought relief should be given. There was both *allegation* and *proof*.

"Both these cases related to the taxation of national bank

shares, and the question was whether the tax levied violated the provisions of the National Banking Act on that subject.

"In this record there is no *averment* and *no proof* of any violation of law by the assessors of New York. * * * But we are nevertheless asked by the argument at bar, in the absence of *allegations* or *proof* of *habitual*, or indeed, of any, under-valuation, to assume to take judicial notice of its existence, notwithstanding such under-valuation would constitute a clear violation of the law of the state. And this we are asked to do in order to reverse a judgment of a state court. Such a presumption of the violation of law and their duty by the assessors the Court of Appeals of New York expressly refused to adopt. *People ex rel Manhattan R. Co. v. Barker*, 146 N. Y. 304." (*New York v. Barker*, 179 U. S. 190.)

Also, in *Exchange National Bank v. Miller*, 19 Fed. Rep. 372, the court used the following language:

"It is contended for the complainant that this testimony brings the case within the rule of *Pelton v. Nat. Bank*, 101 U. S. 153, and *Cummings v. Nat. Bank*, 101 U. S. 153. That is not our view. In *Pelton v. Nat. Bank* it was held that the *systematic* and *intentional* valuation of all other moneyed capital by the taxing officers far below its full value, while shares of national banks were assessed at their full value, was a violation of the act of Congress which prescribes the rule by which they were to be taxed by the state. In that case the court found that the valuation of national bank shares was *intentionally* higher than the valuation of other personal property, and that this discrimination was neither an accident nor a mistake, but a principle *deliberately adopted* in the valuation of all shares in national banks, and applied without exception, and, therefore, the decree below in favor of the complainant was affirmed. In *Cummings v. Nat. Bank* the supreme court found that the assessors of real property, the assessors of personal property, and the auditor of Lucas county, Ohio, *concurred in establishing a rule* of valuation by which real and personal property, except money, was assessed at one-third, and money or invested capital at six-tenths, of its actual value, and that the assessments on shares of incorporated banks, as returned by the state board of equalization for taxation to the auditor of Lucas county were fully equal to their selling price and to their true value in money, and the decree enjoining the collection of the excessive tax was affirmed.

"No such state of facts is shown in the case now before this court. It is true, as shown by the testimony, that, although the shares of the complainant were valued for taxation at but 86.7 per cent of their true value in money, they were valued higher than other personal property, but the error or inequality is not shown to arise otherwise than from a *mistake in judgment* on the part of the assessing officials. It would, perhaps, be more exact to say that the *judgment of the assessors*, in their official valuation, *differs* from the *judgment of witnesses* in their unofficial valuation, as expressed in their testimony. The differences are no greater than frequently arise between witnesses in cases on trial on questions of value. And there is no certain standard by which the court can determine which is correct. Valuations, excepting of money and of standard marketable articles, are, at best, uncertain. The influences which effect salable values are various and often complicated. Much depends upon who is the owner or the vendor, as well as upon who is the purchaser. The shrinkage in the value of estates results in many instances largely from the consideration that the salable value imparted by the fact of the ownership of the deceased is gone. A thousand influences, tangible and intangible, so affect the salable value of property, real and personal, in the city and in the country, as to make its true valuation a work of exceeding difficulty, and it is not to be wondered at, nor is it a circumstance of itself warranting an appeal to a court of chancery, that there are great inequalities in valuations for taxation. To correct these the state has provided for appeals to appropriate tribunals, whose duty it is to equalize valuations and the burden of taxation. When these are exhausted all that can be done, practically, is done, *excepting in cases of intentional discrimination.*

"We are of the opinion that the rule laid down in *Nat. Bank v. Kimball*, 103 U. S. 732, applies here. There it was held that no case for relief is made by *averring* that the assessments are unequal and partial, and that some other property is rated for taxable purposes at less than one-half of its cash value, unless it is *further averred* that the officers appointed to make assessments *combine together and establish a rule or principle of valuation*, the necessary result of which is to tax one species of property higher than others, and higher than the average rate. It has been held, and, we think, correctly, that inequalities in valuation may be so great as to authorize the court to conclude that they are the result of *intention*, but we do not think that the

testimony warrants such conclusion in this case.

"To the same effect as *National Bank v. Kimball* is *Wagoner v. Loomis*, 37 Ohio St. 571, where it was decided that inequalities in valuations, made under a valid law, of property for taxation, do not constitute grounds for enjoining the tax, in the absence of *fraudulent discriminations* by the agents and officers making such valuations, and that a petition for such injunction, which shows that the plaintiff's property was valued at only 80 per cent of its true value in money, while other property in the county was valued at only 40 per cent of its value, and *avers* that such valations were unequal, unjust and illegal, is *insufficient*." (*Exchange Nat. Bank v. Miller*, 19 Fed. Rep. 372.)

VII.

The evidence fails to show that the County Assessors and County Boards of Equalization by intention, custom, system, design or agreement undervalued property within their jurisdiction.

The evidence affirmatively shows that all property within their jurisdictions was assessed by the local taxing officers in good faith and at its full value.

To show that the assessors had assessed property at its full value as provided by law the defendants in this case did not rely upon the presumption of law that the officers did their duty. They called a number of the county assessors, whose testimony may be found at pages 137, 156, 161 and 168 of the printed record. These assessors each testified that they assessed all the property within their jurisdiction at what in their judgment was its full value. Afterwards, and in order to save time and expense, it was stipulated that each and all of the county assessors throughout the state would testify that in assessing property within their jurisdictions they assessed it at what they deemed it to be actually worth, and without any intention or understanding to undervalue it. This stipulation may be found on page 248 of the record, and is as follows:

"It is agreed by counsel for parties hereto that the several

county assessors of the state would each, if present and sworn, testify that the assessment made by him in the year 1904 of the properties within his jurisdiction was made by him and his deputies without any agreement or understanding between them, or between him and the other assessors of the state, to undervalue such property; and that the assessment of such properties by him and his deputies was fixed at what he believed to be the full value thereof, and that no property was intentionally omitted from the tax-list. It is further agreed that upon the trial of the case the court shall consider the facts herein stated the same as if the assessors aforesaid had stated them under oath as witnesses."

So we have the sworn testimony of each and all of the county assessors in the ninety counties of Nebraska that they assessed the property within their jurisdictions in the year 1904 without any agreement or understanding between them or their deputies to undervalue such property, and that such properties were assessed by them at what they believed to be the full value thereof, and that no property was intentionally omitted from the tax-list.

In contradiction of this testimony not a single witness was called by the complainant company, except one Professor Davidson, whose testimony was not deemed of sufficient importance to be carried into the printed record. However, there were witnesses called by the Union Pacific Railway company in its case, whose testimony, by agreement, was considered in the case at bar. None of this evidence is printed in this record, and its absence is not very material, for the reason that it consisted of two or three witnesses from each county and affidavits from residents of each county in about an equal number on each side. Those called by the railroad testified that lands were assessed in their respective counties at from 70 to 80 and 90 per cent. of its value, while the witnesses called by the defendants all testified that lands in the same counties were in their judgment assessed at their full value.

Abstracts were also introduced in evidence in the Union Pacific case, and by agreement used in this case, showing trans-

fers of property in a large number of counties of the state, which showed stated considerations for the property to be in excess of the value fixed by the assessors. This testimony on its face was of very little value, because it was shown that there was no law in Nebraska requiring the true consideration to be stated in the deed, and that as a matter of habit and custom dealers in real estate frequently overstated the true consideration. While in some states the law requires a conveyance to state the true consideration and requires the several equalization boards to inspect the transfer values of land, in Nebraska the law contains no such provision, and therefore the real estate conveyances are not a safe guide in determining what the real value of land is.

VIII.

The question of undervaluation of other property by the local taxing officers was adjudicated by the State Board of Equalization and Assessment when, on the complaint of the complainant and in its presence the State Board of Equalization passed on the valuation of lands, livestock, and other properties subject to the jurisdiction of local taxing officers. Complainant is therefore bound and cannot attack such judgment of said Board collaterally.

Complainant appeared before the state board of equalization and assessment on July 18, 1904, when said board was sitting as a board of equalization to pass on the valuation of all property assessed by the local taxing officers of the state. The board at that time took testimony, heard arguments, considered the questions before it, and adjudicated them. On this question State Auditor Charles Weston testified as follows (Record, p. 248):

Q. Mr. Weston, you recall the meeting of the state board of equalization and assessment in July, 1904, when it was acting as a board of equalization?

A. Yes, sir.

Q. At that time were complaints made as to the valuation of property other than railroad property in the several counties?

A. Yes, sir.

Q. Were those complaints heard and determined by your board?

A. They were.

Q. What was the result of the board's consideration of that matter?

A. We raised some 23 or four counties in the state out of the 90 counties, and lowered none; that is my recollection.

Q. Now, you raised the valuations returned to you in these 24 counties so as to make the valuations represent the full value of that property?

A. That was the intention of the board.

Q. And was it the judgment of your board that the other counties not in the 24 had already been assessed substantially to the full value?

A. Yes, sir; as near as we could determine.

The testimony of State Treasurer Mortensen, a member of the board, was as follows (Record, pp. 254-255):

Q. Now, Mr. Mortensen, you remember the meeting of your board when you acted as a board of equalization of values, of the assessed values of other property in the state?

A. Yes, sir.

Q. That meeting was subsequent to your meeting at which you fixed the assessment of the railroads?

A. Yes, sir.

Q. Were complaints made to your board of equalization alleging undervaluation of other property than the railroads?

A. Yes, sir.

Q. Do you remember whether or not the complainant made a complaint of that kind?

A. I think it was one of the complainants.

Q. What did your board do with those complaints?

A. We considered them.

Q. Did you take testimony?

A. Yes, sir.

Q. From where, from out in the——

A. Yes, and we had a report of the transfer of real estate in the different counties during the past—the previous year.

Q. Made by whom?

A. Made by Land Commissioner Follmer.

Q. Was he a member of the board of assessment?

A. He was a member of the board, yes, sir.

Q. After considering these complaints, what did the board do?

A. Why, we raised some twenty odd counties from 5 to 20 per cent., I think.

Q. Did you lower the valuations in any counties?

A. Not any; no, sir.

Q. Why did you raise them in these 24 counties?

A. Because in our judgment they were too low.

Q. Assessed below their value?

A. Assessed below their value, yes, sir.

Q. After you had raised them from 5 to 20 per cent., whatever it was, did the assessed valuation then in your judgment represent or not the real, actual value of the property?

A. In our judgment it did, yes, sir.

Q. And in the other counties in which you did not raise the values, what was the judgment of the board as to whether or not it had been assessed at its full value or not?

A. It was the judgment of the board that those counties had been assessed at a fair value.

The testimony of the other members of the board is substantially the same.

So we have not only the judgment of the local assessors and the local equalization boards that property other than railroad property had been assessed at its full value, but we have the final judgment of the state board of equalization and assessment, sitting in review of the work of the county assessors and county equalization boards. This final judgment, entered after considering the facts, the testimony, and the arguments, made in good faith, certainly binds the complainant company.

Necessarily the power to value property for assessment purposes must be lodged somewhere, in some person or officer or tribunal. The Nebraska statute lodges that power, first, with the county assessors, who may be reviewed by the county boards

of equalization, whose action also may be reviewed by the state board of equalization and assessment, and there it ends. That judgment is conclusive so long as the board acts within its jurisdiction and in good faith. Any other construction of the law would do violence to our theory and form of government which through its officers is permitted to maintain itself by taxation.

The power of the Nebraska board of equalization under the new law, the one under which the assessment complained of was made, has been fixed and determined by the supreme court of Nebraska in *Hacker v. Howe*, 101 N. W. (Neb.) 255. This was an action brought by a citizen of Nemaha county to restrain the local officers from extending on the tax books of the county the increase in the valuations of the property assessed, such increase having been made by the equalization board of the state in the year 1904. Nemaha county was one of the counties raised by the state board, as testified to by its members above quoted.

The validity of the judgment of the state board, acting as an equalization board in the year 1904, is specifically passed upon and adjudicated by the supreme court of the state in the Hacker case, *supra*. In the course of that opinion it was held that the state board in the equalization of assessments acts in a judicial capacity and the action taken is not subject to collateral attack, "except upon grounds of fraud or other wrongful conduct equivalent thereto, or for the exercise of power not conferred upon it by law."

In that case the supreme court further held "that the action of the state board in the equalization of assessments as between the different counties, in ordering a percentum of increase in the aggregate valuation of some of the counties, cannot be impeached, in the absence of fraud, bad faith, or usurpation of power, by evidence tending to prove that the property in the county affected was assessed by the county authorities at its actual cash value."

It seems clear, therefore, that the judgment of the state board of equalization for the year 1904 has the sanction and approval of the highest court of the state, and for every reason should be respected by the federal courts and held not subject to collateral attack.

IX.

Whenever the law vests in a special officer or tribunal the duty and power to ascertain and determine a question of fact, such decision amounts to more than a mere presumption that the fact exists, and such decision cannot be overthrown in a collateral attack by evidence tending to show that the fact was otherwise than was found and determined.

Pittsburg C. C. & St. L. R. Co. v. Backus, 154 U. S. 434.

Western Union Telegraph Co. v. Taggart, 163 U. S. 1.

Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 229.

Coulter v. Louisville & N. R. Co., 196 U. S. 605.

X.

The complainant in this case has not been discriminated against or denied the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution of the United States by reason of the action of the State Board of Equalization and Assessment in assessing its property in the State of Nebraska, nor by reason of the action of the local taxing officers and local Boards of Equalization which assessed property other than railroads within their jurisdiction.

Head Money Cases, 112 U. S. 595.

Bells Gap R. Co. v. Pennsylvania, 134 U. S. 233.

King v. Mullins, 171 U. S. 436.

Florida C. & P. R. Co. v. Reynolds, 183 U. S. 476.

Coulter v. Louisville & N. R. Co., 196 U. S. 605.

It is respectfully submitted that under the facts in this case

appearing in the record and under the authorities cited, the decree of the trial court should be affirmed.

Norris Brown.

ATTORNEY GENERAL.
For Appellees.

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Of Counsel.